15-290

No.

In the Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,
PETITIONER

v.

HAWKES CO., INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Army Corps of Engineers' determination that the property at issue contains "waters of the United States" protected by the Clean Water Act, 33 U.S.C. 1362(7); see 33 U.S.C. 1251 *et seq.*, constitutes "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. 704, and is therefore subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

PARTIES TO THE PROCEEDING

Petitioner is the United States Army Corps of Engineers.

Respondents are Hawkes Co., Inc.; LPF Properties, LLC; and Pierce Investment Company.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Army Corps of Engineers (Corps), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a), is reported at 782 F.3d 994. The opinion of the district court (App., *infra*, 22a-43a), is reported at 963 F Supp. 2d 868.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2015. A petition for rehearing was denied on July 7, 2015 (App., *infra*, 103a-104a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the Appendix to this petition. App., *infra*, 105a-121a.

STATEMENT

1. a. Congress enacted the Clean Water Act (CWA or Act) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a); see Pub. L. No. 92-500, § 2, 86 Stat. 816 (33 U.S.C. 1251 *et seq.*). Section 301(a) of the CWA prohibits the "discharge of any pollutant"—defined as the addition of any pollutant to the "waters of the United States" from any "point source"—except "as in compliance with" specified provisions of the CWA. 33 U.S.C. 1311(a), 1362(7) and (12). The CWA allows discharges under two complementary permitting regimes. Section 404 authorizes the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a) and (d). Section 402 authorizes the Environmental Protection Agency (EPA) to issue permits for the discharge of any pollutant other than dredged or fill material. 33 U.S.C. 1342.

The Corps' regulations authorize (but do not require) the Corps to provide the agency's view on whether particular tracts contain "waters of the United States" that are subject to the agency's regulatory authority under Section 404 of the CWA when a landowner (for instance) asks the Corps to do so. See 33 C.F.R. 320.1(a)(6), 331.2; see also 33 C.F.R. Pt. 331, App. C. The Corps may provide its view in a document called a "[j]urisdictional determination," which applicable regulations define as "a written Corps

determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) or * * * the River and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*)." 33 C.F.R. 331.2 (emphasis omitted). Neither the CWA nor its implementing regulations require a landowner to obtain a jurisdictional determination before discharging dredged or fill material.

An "[a]pproved jurisdictional determination" is "a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel."[1] 33 C.F.R. 331.2 (emphasis omitted). An approved jurisdictional determination is valid for five years, 33 C.F.R. Pt. 331, App. C, "unless new information warrants revision of the determination before the expiration date." Corps, Regulatory Guidance Letter No. 05-02, ¶ 1 (June 14, 2005). When the Corps issues an approved jurisdictional determination, an affected party may pursue an administrative appeal of that determination within the Corps. See 33 C.F.R. Pt. 331.

Whether or not a jurisdictional determination has been requested or issued, a landowner planning to discharge dredged or fill material on its property has various options. The landowner may apply for a

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[1] The Corps' regulations also provide for issuance of preliminary jurisdictional determinations, which are "written indications that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel." 33 C.F.R. 331.2. Preliminary jurisdictional determinations thus do not reflect any conclusion about whether "waters of the United States" are present. *Ibid.*; see Corps, Regulatory Guidance Letter No. 08-02, ¶¶ 4, 7 (June 26, 2008).

Section 404 permit from the Corps. See 33 U.S.C. 1344; 33 C.F.R. Pts. 323, 325; 40 C.F.R. Pt. 230. If the landowner, having exhausted administrative remedies, is dissatisfied with the Corps' final permitting decision, it may seek judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, including with respect to the Corps' determination that the property at issue contains waters protected by the CWA. See, *e.g.*, *Carabell* v. *United States Army Corps of Eng'rs*, 391 F.3d 704, 706-707 (6th Cir. 2004), vacated on other grounds *sub nom. Rapanos* v. *United States*, 547 U.S. 715 (2006). The landowner may also proceed under an applicable general permit previously issued by the Corps. See 33 U.S.C. 1344(e); 33 C.F.R. Pt. 330 (nationwide permit program).

Alternatively, a landowner may proceed without seeking a permit. The CWA exempts numerous activities, including certain farming and road-maintenance activities, from the permitting requirements. 33 U.S.C. 1344(f). If the activity is not subject to any exemptions, and the government determines that a completed or ongoing discharge violates the CWA, then the government may take administrative action, including the issuance of a warning letter, a "cease and desist" order, 33 C.F.R. 326.3(c), an administrative compliance order, an administrative penalty, or a combination of those options, see 33 U.S.C. 1319(a) and (g). The recipient of an EPA compliance order may bring suit under the APA to challenge the order, and it may contend that the property is not covered by the CWA. See *Sackett* v. *EPA*, 132 S. Ct. 1367, 1370-1371 (2012). The government may also bring an enforcement action in district court to obtain injunctive

and other relief. 33 U.S.C. 1319(b); 33 C.F.R. 326.5. At that time, the discharger may contend, *inter alia*, that its conduct did not violate the CWA because it did not involve a discharge into "the waters of the United States." See, *e.g.*, *United States* v. *Deaton*, 332 F.3d 698, 701-703 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004). In any of those proceedings, the fact that the landowner previously received a jurisdictional determination does not expose it to additional penalties or otherwise alter its rights or obligations within the proceeding.

b. The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. 704. "As a general matter, two conditions must be satisfied for an agency action to be 'final'" under the APA. *Bennett* v. *Spear*, 520 U.S. 154, 177 (1997). "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Id.* at 177-178 (citation and internal quotations omitted). "And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 178 (citation and internal quotations omitted).

In *Sackett*, *supra*, this Court held that an EPA compliance order, which reflects the EPA's determination that a landowner has violated the CWA by discharging pollutants into protected waters without a permit and which requires remedial action, see 33 U.S.C. 1319(a)(3), is "final agency action" subject to judicial review under the APA, 5 U.S.C. 704; see 132 S. Ct. at 1371-1372. The Court explained that the

compliance order represented the "consummation" of the agency's decisionmaking process because the EPA's conclusion that the Sacketts had violated the CWA was not subject to further review within the agency. *Sackett*, 132 S. Ct. at 1372 (quoting *Bennett*, 520 U.S. at 178) (internal quotation marks omitted). The Court also concluded that the compliance order "determined rights or obligations." *Id.* at 1371 (quoting *Bennett*, 520 U.S. at 178). The Court explained that the order by its terms imposed "the legal obligation to 'restore'" the property in question, and that the order required the Sacketts to give the EPA access to their property. *Ibid.* In addition, the order imposed "legal consequences" by "expos[ing] the Sacketts to double penalties in a future enforcement proceeding" and "severely limit[ing] [their] ability to obtain a permit" under the CWA. *Id.* at 1371-1372.

2. a. Respondents Pierce Investment Company and LPF Properties, LLC, own 530 acres of land in Minnesota. Respondent Hawkes Co., Inc. (Hawkes), would like to mine the 530 acres for peat, which is formed in wetlands. Hawkes has an existing peat mining operation nearby and would pay royalties to respondent property owners. App., *infra*, 5a-6a, 23a.

In December 2010, Hawkes applied for a Section 404 permit from the Corps. In March 2011, the Corps informed Hawkes of the Corps' preliminary determination that the property contains waters of the United States. App., *infra*, 6a. In February 2012, after further meetings and visits to the property, the Corps provided Hawkes with an approved jurisdictional determination, which concluded that the property contains waters of the United States. *Id.* at 6a-7a. Respondents' complaint alleges that, during the pro-

cess of developing the jurisdictional determination, Corps employees asserted that the permit process would be costly and time-consuming. *Id.* at 6a; C.A. J.A. 9 (Am. Compl. ¶ 40).

Respondents filed an administrative appeal. In October 2012, finding that the approved jurisdictional determination lacked sufficient analysis to support a finding of regulatory jurisdiction, the Corps' Mississippi Valley Division remanded the jurisdictional determination for reconsideration. App., *infra*, 7a, 44a. In December 2012, the Corps issued a revised approved jurisdictional determination, which again concluded that the property contains waters of the United States. *Id.* at 7a-8a, 44a-102a. The revised approved jurisdictional determination explained that the property contains approximately 150 acres of wetlands that are adjacent to waters that flow directly or indirectly into traditional navigable waters. *Id.* at 50a-51a. The Corps concluded that the wetlands have a significant nexus with a traditional navigable water, the Red River of the North. *Id.* at 83a-100a.

b. In 2013, respondents filed this action, alleging that the Corps' jurisdictional determination was arbitrary and capricious under the APA, 5 U.S.C. 706(2). App., *infra*, 8a, 27a. The Corps moved to dismiss, arguing that the jurisdictional determination was not "final agency action" subject to judicial review under the APA, 5 U.S.C. 704, and that respondents' challenge to the jurisdictional determination was not ripe. App., *infra*, 8a.

The district court dismissed the suit. App., *infra*, 22a-43a. The court held that the Corps' jurisdictional determination was not final agency action under *Bennett*. *Id.* at 31a. The court concluded that, although

the jurisdictional determination "satisfies the first *Bennett* condition" because it marks the consummation of the agency's decisionmaking, *id.* at 32a, it "does not satisfy the second *Bennett* condition" because "it does not determine [respondents'] rights or obligations," *id.* at 34a. The court explained that the jurisdictional determination "does not order [respondents] to take any kind of action" or "affect the legal standards used by agencies and courts in determining where the CWA applies." *Id.* at 35a. The court held that *Sackett* did not require a different result because the EPA compliance order at issue there subjected the recipient to several immediate consequences, including the obligation to remediate the property, and also limited the recipient's ability to obtain a permit. *Id.* at 36a-43a.

3. a. The court of appeals reversed. App., *infra*, 1a-17a. The court held that a jurisdictional determination is a reviewable "final agency action" under the APA. *Id.* at 16a-17a. The court acknowledged that the Fifth Circuit had reached the opposite conclusion in *Belle Co.* v. *United States Army Corps of Engineers*, 761 F.3d 383 (2014), cert. denied *sub nom. Kent Recycling Services, LLC* v. *United States Army Corps of Engineers*, 135 S. Ct. 1548 (2015), petition for reh'g pending, No. 14-493 (filed Apr. 16, 2015). The court concluded, however, that the Fifth Circuit had "misapplied the Supreme Court's decision in *Sackett*." App., *infra*, 2a. In the court of appeals' view, "the Court's application of its flexible final agency action standard in *Sackett*" indicated that a jurisdictional determination should be considered final agency action. *Id.* at 5a.

The court of appeals held that the jurisdictional determination satisfied *Bennett*'s first prong because it "was the consummation of the Corps' decisionmaking process on the threshold issue of the agency's statutory authority." App., *infra*, 9a. The court explained that the Corps' regulatory guidance describes an approved jurisdictional determination as a "definitive, official determination." *Ibid.* (citation omitted).

Turning to *Bennett*'s second prong, the court of appeals concluded that an approved jurisdictional determination determines "rights and obligations" and imposes "legal consequences." App., *infra*, 10a. The court found little difference between "an agency order that compels affirmative action," such as the EPA compliance order at issue in *Sackett*, and a jurisdictional determination, which, in the court's view, "prohibits a party from taking otherwise lawful action." *Id.* at 11a. The court stated that a jurisdictional determination "requires [respondents] either to incur substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties." *Ibid.*

The court of appeals also held that "there is no other adequate [judicial] remedy" if immediate judicial review of the Corps' jurisdictional determination is unavailable. App., *infra*, 13a (citation omitted; brackets in original); see 5 U.S.C. 704. While acknowledging that respondents could seek a permit and then obtain judicial review of that decision, the court asserted that, "as a practical matter, the permitting option is prohibitively expensive and futile." App., *infra*, 14a. The court also stated that respondents' "other option—commencing to mine peat without a permit and await an enforcement action—is even more

plainly an inadequate remedy" because respondents could incur "huge additional potential liability" by doing so. *Ibid.* (citing *Sackett*, 132 S. Ct. at 1372). The court therefore concluded that "a properly pragmatic analysis of * * * final agency action principles compels the conclusion that an [a]pproved [jurisdictional determination] is subject to immediate judicial review." *Id.* at 16a.

b. Judge Kelly concurred. App., *infra*, 18a-21a. She described the reviewability issue presented here "as a close question." *Id.* at 18a. She observed that a jurisdictional determination does not alter the recipient's legal obligations in the way that the compliance order in *Sackett* did. *Id.* at 18a-20a. Judge Kelly concluded, however, that a jurisdictional determination should be immediately reviewable to provide the landowner an opportunity, before seeking a permit, "to show the CWA does not apply to its land at all." *Id.* at 20a.

4. The court of appeals denied the Corps' petition for rehearing en banc and for panel rehearing. App., *infra*, 103a-104a.

5. In 2015, after a multi-year process and after the court of appeals issued its decision in this case, the Corps and the EPA issued a new rule clarifying the agencies' interpretation of the scope of waters covered by the CWA. See 80 Fed. Reg. 37,055 (June 29, 2015) ("In this final rule, the agencies clarify the scope of 'waters of the United States' that are protected under the [CWA], based upon the text of the statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the agencies' technical expertise and experience in implementing the statute."); see also 79 Fed. Reg. 22,188 (Apr. 21, 2014).

That rule provides that it will govern jurisdictional determinations issued after its effective date. 80 Fed. Reg. at 37,054, 37,073-37,074. The approved jurisdictional determination at issue in this case was issued under the agencies' previous interpretation of CWA coverage, and the new rule does not affect its five-year period of validity.[2] See p. 3, *supra*; 80 Fed. Reg. at 37,074.

REASONS FOR GRANTING THE PETITION

This case presents a significant question concerning the proper mode and timing of judicial review of a jurisdictional determination stating that particular property contains "waters of the United States" covered by the CWA. 33 U.S.C. 1362(7). The court of appeals held that a jurisdictional determination is reviewable "final agency action" under the APA. 5 U.S.C. 704. That ruling conflicts with the Fifth Circuit's recent decision in *Belle Co.* v. *United States Army Corps of Engineers*, 761 F.3d 383 (2014), cert. denied *sub nom. Kent Recycling Services, LLC* v. *United States Army Corps of Engineers*, 135 S. Ct. 1548 (2015), petition for reh'g pending, No. 14-493 (filed Apr. 16, 2015).

A square but shallow circuit conflict thus has developed on the question whether, in light of this Court's decision in *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012), a Corps jurisdictional determination is judicially reviewable final agency action. In addition to this

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[2] Recipients of approved jurisdictional determinations predating the new rule have the option, however, of requesting that the Corps issue a new jurisdictional determination under the new rule. 80 Fed. Reg. at 37,074. In that event, the Corps would reconsider the CWA-coverage issue in light of current conditions on the property and the standards announced in the new rule.

petition seeking review of the Eighth Circuit's decision, a petition for rehearing of this Court's denial of certiorari in *Kent Recycling Services, LLC* v. *United States Army Corps of Engineers* (No. 14-493) is currently pending before the Court.[3] In that case, however, there are significant questions concerning whether petitioner Kent Recycling has standing and whether the case remains live. See 14-493 Br. in Opp. 8-12; 14-493 Br. in Opp. to Pet. for Reh'g 5-8. If the Court concludes that the question presented here should be resolved now rather than left for further percolation in the courts of appeals, this case would provide a more suitable vehicle than *Kent Recycling* for resolution of that issue.

A. The Decision Below Created A Circuit Conflict

1. As the court of appeals acknowledged, App., *infra*, 2a, its decision squarely conflicts with the Fifth Circuit's decision in *Belle*, *supra*. There, the Fifth Circuit held that a jurisdictional determination does not satisfy the test for final agency action set forth in *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997), because it does not impose legal obligations or consequences beyond those already imposed by the CWA itself. *Belle*, 761 F.3d at 389-394. The decision below also conflicts with the Ninth Circuit's pre-*Sackett* decision in *Fairbanks North Star Borough* v. *U.S. Army Corps of Engineers*, 543 F.3d 586 (2008), cert. denied, 557 U.S. 919 (2009) (*Fairbanks*).

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[3] Because the petition for a writ of certiorari seeking review of the Fifth Circuit's decision in *Belle*, *supra*, is captioned *Kent Recycling Services, LLC* v. *United States Army Corps of Engineers* (No. 14-493) in this Court, this brief refers to the petition in No. 14-493 as *Kent Recycling*.

Unlike the Eighth Circuit, the Fifth Circuit in *Belle* concluded that this Court's decision in *Sackett* does not mandate the conclusion that a jurisdictional determination is final agency action. *Belle*, 761 F.3d at 391-392. The Fifth Circuit explained that the EPA compliance order at issue in *Sackett* imposed legal obligations and consequences that went beyond those imposed by the CWA. *Id.* at 391 (citing *Sackett*, 132 S. Ct. at 1371-1372). Unlike a compliance order, the Fifth Circuit explained, a jurisdictional determination is simply a "notification of the property's classification as wetlands" that "does not state that [the recipient] is in violation of the CWA," does not increase the recipient's exposure to penalties, and does not affect its ability to obtain a permit. *Id.* at 391-393.

2. The division between the Fifth and Eighth Circuits is unlikely to be resolved without this Court's intervention. The Eighth Circuit was aware of the Fifth Circuit's contrary ruling in *Belle* when it issued the decision below. App., *infra*, 2a. The government sought rehearing en banc on the ground that the decision created a conflict with *Belle*, but the Eighth Circuit denied the petition. *Id.* at 103a-104a. The circuit conflict is therefore likely to endure until this Court resolves the issue.

B. The Decision Below Is Incorrect

To be final agency action under 5 U.S.C. 704, an agency determination "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178 (citation and internal quotation marks omitted). The court of appeals concluded that the jurisdictional determination at issue in this case satisfies that standard because it "requires [respondents] either to

incur substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties." App., *infra*, 11a. That is incorrect. The jurisdictional determination does not create the quandary that concerned the court, since a landowner who has not received a jurisdictional determination faces precisely the same set of options, and precisely the same exposure to penalties for any CWA violations that his conduct may entail. Receipt of a jurisdictional determination simply provides the landowner with additional information that may assist him in choosing among the available options.

1. a. A jurisdictional determination informs the landowner of the Corps' view that particular property contains "waters of the United States" and is therefore subject to the CWA's prohibition on unauthorized pollutant discharges into those waters. 33 U.S.C. 1362(7); see 33 U.S.C. 1311(a). The jurisdictional determination does not direct the landowner to take (or refrain from taking) any action, and it does not impose any obligations not already imposed by the CWA. If the property in fact contains waters of the United States, the CWA requires the landowner to obtain a permit before discharging pollutants into those waters, whether or not he has requested or received a jurisdictional determination. 33 U.S.C. 1311(a), 1342, 1344; 33 C.F.R. 331.2.

The jurisdictional determination also does not alter the manner in which the Corps may enforce the CWA. Whether or not the Corps has issued a jurisdictional determination, if the Corps or the EPA concludes that a landowner has violated the CWA by discharging pollutants without a permit, the EPA may issue an

administrative compliance order (of the sort at issue in *Sackett*), or it may institute an administrative penalty proceeding and impose a penalty. 33 U.S.C. 1319(a) and (g). Both types of administrative action afford the landowner the opportunity to obtain immediate judicial review of the agency's underlying conclusion that the land contains waters of the United States. See 33 U.S.C. 1319(g)(8) (providing for judicial review of administrative penalty decision); *Sackett*, 132 S. Ct. at 1371-1372 (compliance orders are reviewable under the APA).

Such enforcement actions are necessarily predicated on the agency's assessment that the CWA applies to the waters in question; but the fact that the Corps has previously expressed that assessment in a jurisdictional determination does not affect the landowner's rights in an administrative penalty proceeding. See 33 U.S.C. 1319(a) and (g); *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 129-130 (1939). Similarly if the United States commences a judicial enforcement action, the Corps' prior issuance of a jurisdictional determination would not alter the United States' burden of establishing that the land in fact contains waters of the United States. 33 U.S.C. 1319(b). And if the landowner is ultimately found liable in any of those proceedings, the jurisdictional determination does not alter the range of potential sanctions to which the landowner is subject under the CWA. 33 U.S.C. 1319(d). Thus, before and after a jurisdictional determination is issued, the landowner faces the same legal regime, the same potential obligations, and the same legal exposure.[4]

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[4] The court of appeals believed that a jurisdictional determination increases "the penalties [respondents] would risk if they chose

b. In concluding that a jurisdictional determination satisfies *Bennett*'s second prong, the court of appeals conflated the potential *practical* effects of a jurisdictional determination with the altered *legal* obligations that are required under *Bennett*. App., *infra*, 11a-13a. It is true that, as a practical matter, a landowner who receives a jurisdictional determination that his property contains CWA-protected waters may have a greater incentive to seek a permit than someone who has not received a similar determination. But that incentive arises solely from the additional information that a jurisdictional determination conveys to the landowner about the agency's view of the CWA's coverage. When an agency communication does not alter the legal obligations or sanctions to which the recipient is already subject, that sort of practical effect is not sufficient to render the communication "final agency action." See *National Ass'n of Home Builders*

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to begin mining without a permit" because violating the CWA after receiving a jurisdictional determination would result in "substantial criminal monetary penalties and even imprisonment for a knowing CWA violation." App., *infra*, 15a. That is incorrect. The CWA directs a court, in assessing an appropriate civil penalty for a violation, to consider, *inter alia*, any "good-faith efforts" to comply with the CWA's requirements. 33 U.S.C. 1319(d). In addition, the CWA imposes criminal penalties for violating certain enumerated provisions of the statute, and knowing violations are subject to greater potential penalties. 33 U.S.C. 1319(c)(1)-(2). But those provisions do not mention, much less assign any particular evidentiary weight to, the Corps' prior issuance of a jurisdictional determination. At most, a property owner's receipt of a jurisdictional determination might be offered as evidence of the owner's knowledge of its obligations under the CWA. See *Fairbanks*, 543 F.3d at 595. But the same could be said of any number of non-final agency warnings or opinion letters, or even a private consultant's report.

v. *Norton*, 415 F.3d 8, 13-16 (D.C. Cir. 2005) (incentive to comply voluntarily with agency's guidance concerning underlying statutory obligation is insufficient to establish legal consequences under *Bennett*).

The court of appeals therefore erred in likening a jurisdictional determination to a regulation or order that "prohibits a party from taking otherwise lawful action." App., *infra*, 11a. The decisions on which the court relied (*id.* at 11a-13a) all concerned regulatory actions that imposed additional legal requirements, beyond those established by statute, with which regulated parties were required to comply. See *Bennett*, 520 U.S. at 178 (where agency opinion authorized entities to "take" endangered species only upon fulfillment of conditions listed in the opinion, and entities could be penalized for violating those conditions, opinion "alter[ed] the legal regime"); *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 151-152 (1967) (regulations were final because they "ha[d] the status of law and violations of them carry heavy criminal and civil sanctions"); *Columbia Broad. Sys., Inc.* v. *United States*, 316 U.S. 407, 418 (1942) (regulations had the "force of law" because they "require [the Federal Communications Commission] to reject and authorize it to cancel licenses on the grounds specified in the regulations without more"); see also *Frozen Food Express* v. *United States*, 351 U.S. 40, 41-45 (1956) (order determining which commodities fell within a statutory "agricultural" exemption to a permitting requirement was final because it established a rule of general applicability that had the force of law).

c. The court of appeals' reliance on *Sackett* was misplaced. In holding that the EPA compliance order at issue in *Sackett* was final agency action, the Court

did not rely on the pragmatic incentives that recipients likely felt upon being notified of the agency's allegations that their property contained covered waters and that they had violated the CWA. Rather, the Court found dispositive the fact that the compliance order materially increased both the landowners' legal obligations and the penalties to which they were potentially subject. 132 S. Ct. at 1371-1372. A jurisdictional determination does not similarly alter the legal status quo.

Specifically, the *Sackett* Court explained that the compliance order imposed a "legal obligation" on the Sacketts to "'restore' their property according to an agency-approved Restoration Work Plan," and to give the EPA access to the property and relevant documentation. 132 S. Ct. at 1371. Those obligations arose "[b]y reason of the [compliance] order," not as a result of the CWA itself. *Ibid.* The *Sackett* Court further concluded that "'legal consequences flow' from issuance of the [compliance] order" because, under the CWA, a landowner can be liable for penalties for violating the compliance order itself, in addition to penalties for violating the Act. *Ibid.* (quoting *Bennett*, 520 U.S. at 178) (citation and internal quotation marks omitted). The compliance order also "severely limit[ed] the Sacketts' ability to obtain a permit for their fill" under Corps regulations that restrict the availability of permits for activities that are the subject of a compliance order. *Id.* at 1372.

A jurisdictional determination possesses none of the characteristics that were dispositive in *Sackett*. It does not require the recipient to take any action, remedial or otherwise. Nor does it expose a recipient to any additional penalties beyond those that the CWA

provides for violating the statute. 33 U.S.C. 1319(d). A jurisdictional determination also has no impact on the recipient's ability to obtain a permit, since the regulations limiting permits following a compliance order do not apply to jurisdictional determinations. See 33 C.F.R. 326.3(e)(1)(iv). And because jurisdictional determinations (unlike EPA compliance orders) are typically provided to persons who request them, they are not easily used "to enable the strong-arming of regulated parties." *Sackett*, 132 S. Ct. at 1374.

2. Even if a jurisdictional determination satisfied *Bennett*'s requirements for final agency action, review would be available under the APA only if there is "no other adequate [judicial] remedy." 5 U.S.C. 704. Contrary to the court of appeals' conclusion (App., *infra*, 13a-16a), respondents possess adequate alternative opportunities to argue in court that their property does not contain CWA-protected waters.

The permitting process provides one such avenue.[5] When the Corps denies a permit, or issues a permit subject to conditions that the applicant opposes, the applicant may seek judicial review of that decision, and may contend in that proceeding that any waters on its property are not covered by the Act. See 33 U.S.C. 1344(a); 33 C.F.R. 331.10, 331.12; see also *Pre-*

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[5] In *Sackett*, the Court concluded that the Corps' permitting process did not provide an adequate means of seeking review of an EPA compliance order. That holding, however, was based on a circumstance not present here. Because the *EPA* had issued the compliance order, the Court stated that judicial review of the Corps' permitting decision would not "provide an 'adequate remedy' for action already taken by another agency." 132 S. Ct. at 1372. Here, the Corps "issued the [jurisdictional determination], so it is not the case that the only alternative remedy is one provided by a different agency." *Belle*, 761 F.3d at 394 n.4.

con Dev. Corp. v. *United States Army Corps of Eng'rs*, 633 F.3d 278, 287-297 (4th Cir. 2011). Many parties have obtained judicial review of a CWA-coverage issue through that route. See, *e.g.*, *Carabell* v. *United States*, 391 F.3d 704, 706-707 (6th Cir. 2004), vacated on other grounds *sub nom. Rapanos* v. *United States*, 547 U.S. 715 (2006). And if the Corps grants a permit that the applicant accepts, there will be no need for judicial review of the threshold jurisdictional determination.

A recipient of a jurisdictional determination who elects to proceed with discharges on his property may also seek judicial review of the CWA coverage issue if he is the subject of an agency-initiated enforcement proceeding. If the agency imposes administrative penalties, 33 U.S.C. 1319(g), or issues an EPA compliance order, 33 U.S.C. 1319(a), those actions are immediately reviewable. See pp. 4-5, *supra*. The United States could also initiate a judicial enforcement action, in which it would have to demonstrate by a preponderance of the evidence that the property contains covered waters. 33 U.S.C. 1319(b).

To be sure, the permitting process can sometimes be expensive, and a landowner who discharges dredged or fill material without a permit may face monetary penalties if a court ultimately concludes that the discharges occurred into CWA-protected waters. It is therefore understandable that persons in respondents' position would prefer a pre-permit, pre-discharge judicial ruling on the CWA coverage issue. Neither the CWA nor the applicable agency regulations, however, *require* the Corps to issue jurisdictional determinations, either in general or in any particular case. If respondents had not received a juris-

dictional determination, they could have obtained a judicial ruling on the coverage question only through the routes described above, *i.e.*, by applying for a permit and then seeking judicial review of the Corps' decision on that application, or by contesting the CWA's applicability in opposing any enforcement action. The fact that respondents requested and received a jurisdictional determination does not make those avenues of review any less "adequate" than they would otherwise be.

C. The Question Presented Is Recurring And Significant

1. The Corps issues tens of thousands of approved jurisdictional determinations every year. See 80 Fed. Reg. at 37,065; Corps, *Regulatory—Protecting the Integrity of America's Waters* (Feb. 2, 2015), http://www.usace.army.mil/Portals/2/docs/civilworks/budget/strongpt/fy16sp_regulatory.pdf. Although the CWA does not require the Corps to issue jurisdictional determinations, see 33 C.F.R. 320.1(a)(6), the Corps provides them in order to give requesting landowners information about the agency's view of CWA coverage. And while no statutory or regulatory provision requires property owners to seek jurisdictional determinations before undertaking plans for their property or applying for a permit, those who request them are able to take the agency's views on CWA coverage into account in deciding how best to proceed.

Under the court of appeals' decision, a landowner who disagrees with the agency's approved jurisdictional determination may obtain judicial review immediately, before the Corps has had an opportunity to consider whether the landowner's contemplated activities would require a CWA permit, whether those activities are already covered by a general permit, see

33 U.S.C. 1344(e)(1), or whether an application for an individual permit should be granted. And if the Corps prevails in such a suit, the court's decision will not definitively resolve the CWA coverage question. If jurisdictional determinations are reviewable under the APA, they would presumably be reviewed under the APA's deferential "arbitrary [and] capricious" standard. 5 U.S.C. 706(2)(A). A judicial decision upholding a jurisdictional determination under that standard would not prevent the landowner from arguing, in a subsequent civil enforcement action, that the agency had failed to prove by a preponderance of the evidence that the property in question contained waters of the United States.

Allowing immediate judicial review of the Corps' jurisdictional determinations would therefore create a system of piecemeal and potentially duplicative proceedings. That prospect might deter the Corps from engaging in an informational practice that is triggered by a landowner's request and is intended to benefit landowners as well as to promote compliance with the CWA. See *Belle*, 761 F.3d at 394 (immediate judicial review would "disincentivize the Corps from providing [jurisdictional determinations]," thereby "undermin[ing] the system through which property owners can ascertain their rights and evaluate their options").

2. The question presented is likely to recur. The Corps issues thousands of jurisdictional determinations each year, and the Eighth Circuit's decision in this case will likely encourage other regulated parties to seek immediate judicial review. Indeed, at least one other suit seeking review of a jurisdictional determination is currently pending before a district court in the Seventh Circuit. See *Orchard Hill Bldg.*

Co. v. *United States Army Corps of Eng'rs*, 1:15-cv-6344 Docket entry No. 1 (N.D. Ill. July 21, 2015).

D. This Case Is A Better Vehicle Than *Kent Recycling* For Addressing The Question Presented

The petition for a writ of certiorari in *Kent Recycling* likewise presents the question whether a Corps jurisdictional determination is judicially reviewable under the APA. 14-493 Pet. i. The Court denied certiorari in *Kent Recycling* in March 2015, shortly before the Eighth Circuit issued its decision in this case. Kent Recycling then sought rehearing on the basis of the circuit conflict created by the Eighth Circuit's decision, see 14-493 Pet. for Reh'g 3-6, and the petition for rehearing remains pending before this Court. If the Court concludes that the question presented warrants its review, this case is the better of the two vehicles for resolving the issue.

1. As the government explained in its brief in opposition to the certiorari petition in *Kent Recycling*, it is unclear whether Kent Recycling has standing to seek this Court's review and whether the case continues to present a live controversy. See 14-493 Br. in Opp. 8-12. Although Kent Recycling alleges that it holds an option to purchase the property in question, 14-493 Pet. App. A2; see *id.* at D4 (3:12-cv-247 Compl. ¶ 14), the owner of the property at issue did not file its own certiorari petition challenging the Fifth Circuit's decision, and is actively pursuing a permit to use the property as part of a mitigation bank (*i.e.*, as wetlands that will be protected in order to offset authorized impacts on other waters protected by the CWA), see 14-493 Br. in Opp. 11-12. In addition, the jurisdictional determination at issue in *Kent Recycling* expired by its terms on May 15, 2014. 14-493 Pet. App. E2; 14-

493 Br. in Opp. 12 n.3. Although the Corps might (or might not) reach the same coverage determination under the new "waters of the United States" rule, the expiration of the purported "final agency action" that Kent Recycling seeks to challenge creates a further potential threshold obstacle to this Court's resolution of the question presented in that case.

2. This case, by contrast, presents no significant defects as a vehicle for addressing the question whether a jurisdictional determination is final agency action. Respondents in this case include the owners of the relevant land, and there is no reason to doubt their continuing interest in mining peat on the property. And while the jurisdictional determination respondents seek to challenge was issued under the agency's previous interpretation of CWA coverage, which has been superseded by the new rule, the jurisdictional determination itself is valid until 2017. Unless respondents request a new jurisdictional determination under the new rule, they will retain a continuing interest in whether the existing jurisdictional determination is immediately reviewable.

Thus, if the Court concludes that the question presented warrants its review at this time, the Court should grant this petition for a writ of certiorari. The petition for rehearing in *Kent Recycling* (No. 14-493) could then be held pending the resolution of this case, and disposed of as appropriate in light of the Court's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2015

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 13-3067

HAWKES CO., INC., ET AL., PLAINTIFFS-APPELLANTS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, DEFENDANT-APPELLEE

AMERICAN FARM BUREAU FEDERATION; NATIONAL ASSOCIATION OF HOME BUILDERS; NATIONAL MINING ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; UTILITY WATER ACT GROUP; FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS, AMICI ON BEHALF OF APPELLANTS

Submitted: Dec. 11, 2014
Filed: Apr. 10, 2015

Before: LOKEN, BRIGHT, and KELLY, Circuit Judges.

LOKEN, Circuit Judge.

Hawkes Co., Inc. (Hawkes), wishes to mine peat from wetland property owned by two affiliated companies in northwestern Minnesota. The United States Army Corps of Engineers derailed that plan when it issued an Approved Jurisdictional Determination ("JD") that the property constitutes "waters of the

United States" within the meaning of the Federal Water Pollution Control Act (the "Clean Water Act" or "CWA"), and therefore appellants must have a permit to discharge dredged or fill materials into these "navigable waters." *See* 33 U.S.C. §§ 1344(a), 1362(7). Appellants brought this action seeking judicial review of the JD and now appeal the district court's grant of the government's motion to dismiss their Amended Complaint. The district court concluded that an approved JD, though the consummation of the Corps' jurisdictional decisionmaking process, was not a "final agency action" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 704. While the appeal was pending, a panel of the Fifth Circuit reached the same conclusion. *Belle Co., LLC v. U.S. Army Corps of Eng'rs*, 761 F.3d 383 (5th Cir. 2014), *cert. denied*, __ U.S. __, 135 S. Ct. 1548, __ L. Ed. 2d __, 83 U.S.L.W. 3291 (U.S. Mar. 23, 2015) (No. 14-493).

We conclude that both courts misapplied the Supreme Court's decision in *Sackett v. EPA*, __ U.S. __, 132 S. Ct. 1367, 182 L. Ed. 2d 367 (2012). Therefore, we reverse.

I.

The CWA requires a permit from the Corps to discharge dredged or fill materials into "navigable waters," and a permit from the Environmental Protection Agency (or an authorized state agency) to discharge any "pollutant" into navigable waters. *See* 33 U.S.C. §§ 1311(a), 1342, 1344. The statute defines

"navigable waters" to mean "the waters of the United States," § 1362(7). This broad definition prompted the Corps and the EPA to make "sweeping assertions of jurisdiction" over every stream, ditch, and drain that can be considered a tributary of, and every wetland that is adjacent to, traditional navigable waters. *Rapanos v. United States*, 547 U.S. 715, 726-727, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006) (plurality opinion).

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985), the Supreme Court held that the Corps may require permits for the discharge of fill material into wetlands adjacent to the "waters of the United States." But in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001), the Court rejected the Corps' assertion of CWA jurisdiction over "nonnavigable, isolated, intrastate waters" where migratory birds are present. And in *Rapanos*, the Court concluded that the Corps' asserted jurisdiction over "wetlands based on adjacency to nonnavigable tributaries" went beyond its statutory authority. 547 U.S. at 782, 126 S. Ct. 2208 (Kennedy, J., concurring in the judgment). Because the Court's plurality and Justice Kennedy adopted different narrower tests to determine when wetlands are "waters of the United States," we held "that the Corps has jurisdiction over wetlands that satisfy either test" in *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009).

The CWA imposes heavy civil and criminal penalties on a person who discharges into navigable waters without a required permit, or in violation of an issued permit. *See* 33 U.S.C. § 1319; *Rapanos*, 547 U.S. at 721, 126 S. Ct. 2208. When the Corps or the EPA finds that a person is violating the CWA's discharge restrictions, or a permit issued under the CWA, the agency "shall issue an order requiring such person to comply," as in *Sackett*, or bring a civil enforcement action, as in *Riverside Bayview Homes* and *Rapanos*. *See* 33 U.S.C. §§ 1319(a)(3) (EPA) and 1344(s) (Corps). In *Sackett*, the EPA issued an administrative compliance order against a person for depositing fill into jurisdictional wetlands without a permit, ordering, among other remedies, that the site be restored. The EPA persuaded the lower courts the order was not subject to "pre-enforcement judicial review." Applying the test for determining a final agency action in *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997), a unanimous Court held that the compliance order was a final agency action subject to immediate judicial review under the APA:

> [I]t is hard for the Government to defend its claim that the issuance of the compliance order was just "a step in the deliberative process" when the agency rejected the Sacketts' attempt to obtain a hearing and when the *next* step will either be taken by the Sacketts (if they comply with the order) or will involve judicial, not administrative, deliberation (if

the EPA brings an enforcement action). 132 S. Ct. at 1373.

The question in this case is whether the Court's application of its flexible final agency action standard in *Sackett*[1] should also apply in this case, where appellants seek judicial review of an adverse JD without either completing the CWA permit process or risking substantial enforcement penalties by mining peat and discharging dredged or fill materials without a permit. That question requires a close look at the allegations in their Amended Complaint.

II.

In reviewing the district court's Rule 12(b)(6) dismissal, we accept as true the facts alleged in the Amended Complaint. Hawkes is in the business of mining and processing peat, a "wetland dependant" activity regulated in Minnesota through permits issued by the Minnesota Department of Natural Resources. Pierce Investment Co. and LPF Properties, LLC, have property interests in a 530-acre parcel in northwestern Minnesota that contains high quality peat near

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[1] The Court has consistently taken a "pragmatic" and "flexible" approach to the question of finality, and to the related question whether an agency action is ripe for judicial review. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148-50, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967); *accord Bell v. New Jersey*, 461 U.S. 773, 779, 103 S. Ct. 2187, 76 L. Ed. 2d 312 (1983); *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 200-201, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983).

Hawkes's existing peat-mining operations. All three companies are owned by members of the Pierce family.

After obtaining an option to purchase the property subject to regulatory approval, Kevin Pierce and Hawkes met with Corps and MDNR representatives to discuss Hawkes's plan to expand its operations to include the property, which would extend the life of its peat mining ten to fifteen years. In December 2010, Hawkes applied to the Corps for a CWA permit. At a January 2011 meeting, Corps representatives urged Pierce to abandon his plan, emphasizing the delays, cost, and uncertain outcome of the permitting process. Pierce responded that he had an option to purchase and intended to proceed. In March, the Corps sent a letter advising it had made a "preliminary determination" the wetland is a regulated water of the United States and, "at a minimum," an environmental assessment would be required. At an April meeting, a Corps representative told Pierce a permit would take years and the process would be very costly. During a site visit in early June, another Corps representative told a Hawkes employee that "he should start looking for another job." In August, the Corps sent Hawkes a letter advising that nine additional information items costing more than $100,000 would be needed, including hydrological and functional resource assessments and an evaluation of *upstream* potential impacts. In November, Corps representatives met with the land owner and urged that he sell the property to a "wetlands bank," advising that an environmental impact

statement would likely be required, delaying the issuance of any permit for several years.

Appellants challenged the Corps' preliminary determination. In November, the Corps provided a "draft" JD concluding the property was connected by a "Relatively Permanent Water" (a series of culverts and unnamed streams) that flowed into the Middle River and then into the Red River of the North, a traditional navigable water some 120 miles away. Appellants' wetland consultant pointed out numerous errors in the analysis. Nonetheless, in February 2012 the Corps issued an Approved JD concluding the property was a water of the United States because of its "significant nexus" to the Red River. *See* 33 C.F.R. §§ 320.1(a)(6), 325.9. Appellants responded by filing a timely administrative appeal. *See* 33 C.F.R. §§ 331.2, 331.3, 331.6.

In October 2012, the Corps' Deputy Commanding General for Civil and Emergency Operations sustained the appeal, concluding after detailed analysis that the administrative record "does not support [the District's] determination that the subject property contains jurisdictional wetlands and waters," and remanding to the District "for reconsideration in light of this decision." On December 31, 2012, the Corps nonetheless issued a Revised JD concluding, without additional information, that there is a significant nexus between the property and the Red River of the North, and advising appellants that the Revised JD was a

"final Corps permit decision in accordance with 33 C.F.R. § 331.10," which meant their administrative remedies were exhausted. *See* 33 C.F.R. § 331.12.

Appellants then filed this action seeking judicial review of the Revised JD, alleging that it does not meet either of the applicable tests for the assertion of CWA jurisdiction established in *Rapanos*—the plurality's "relatively permanent" test, or Justice Kennedy's "significant nexus" test. The Corps moved to dismiss the complaint, arguing the Revised JD was not a final agency action and the issue was not ripe for judicial review. The district court dismissed the complaint for lack of final agency action. *Hawkes Co., Inc. v. U.S. Army Corps of Eng'rs*, 963 F Supp. 2d 868, 871, 878 (D. Minn. 2013). This appeal followed.

III.

The APA provides for judicial review of a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The APA "evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials." *Califano v. Sanders*, 430 U.S. 99, 104, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977). When an agency action is final and, if final, appropriate for judicial review are issues that have arisen in a variety of federal agency contexts in the past one hundred years. *See, e.g., Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatl.*, 400 U.S. 62, 70-71, 91 S. Ct. 203, 27 L. Ed. 2d 203

(1970); *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 132 n.11, 143-44, 59 S. Ct. 754, 83 L. Ed. 1147 (1939). In *Bennett*, 520 U.S. at 177-78, 117 S. Ct. 1154, the Court synthesized its prior precedents on the first issue:

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

A. Though the Corps argues otherwise, we agree with the district court (and every court to consider the issue) that the Revised JD clearly meets the first *Bennett* factor—it was the consummation of the Corps' decisionmaking process on the threshold issue of the agency's statutory authority. *See Belle Co.*, 761 F.3d at 389-90; *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591-93 (9th Cir. 2008). The regulations provide that an Approved JD "constitute[s] a Corps final agency action." 33 C.F.R. § 320.1(a)(6). The Corps' Regulatory Guidance Letter No. 08-02, at 2, 5, described an Approved JD as a "definitive, official determination that there are, or that there are not, jurisdictional 'waters of the United States' on a site," and stated that an Approved JD "can be relied upon by a landowner, permit applicant, or

other affected party for five years" (quotation omitted). Jurisdictional determinations and permitting decisions are discrete agency actions; a party may obtain a JD without seeking a permit, and may obtain a permit without seeking an Approved JD. *Fairbanks*, 543 F.3d at 593. Thus, when an Approved JD has issued, "the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication." *Port of Bos.*, 400 U.S. at 70-71, 91 S. Ct. 203; *see Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733, 118 S. Ct. 1665, 140 L. Ed. 2d 921 (1998). The possibility that the agency might informally reconsider its decision "does not suffice to make an otherwise final agency action non-final." *Sackett*, 132 S. Ct. at 1372 (quotation omitted).

B. The district court concluded that the Approved JD does not satisfy *Bennett's* second factor because it is not an agency action "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" In *Sackett*, the EPA compliance order required petitioners to restore property they had altered without a permit and subjected them to the risk of $75,000 per day in penalties if they chose to disobey. By contrast, the district court reasoned, appellants "face no such obligations or changes in their rights as a result of their jurisdictional determination." They "may pursue a permit without a disadvantage." 963 F Supp. 2d at 876-77.

1. In our view, this analysis seriously understates the impact of the regulatory action at issue by exaggerating the distinction between an agency order that compels affirmative action, and an order that prohibits a party from taking otherwise lawful action. Numerous Supreme Court precedents confirm that this is not a basis on which to determine whether "rights or obligations have been determined" or that "legal consequences will flow" from agency action.

—In *Bennett*, the Court held that a Fish and Wildlife Service biological opinion satisfied the second factor because it required the Bureau of Reclamation to comply with its conditions and thereby had "direct and appreciable legal consequences." 520 U.S. at 158, 178, 117 S. Ct. 1154. Though not self-executing, the biological opinion was mandatory. Likewise, here, the Revised JD requires appellants either to incur substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties.

—In *Abbott Laboratories*, the Court held that prescription drug labeling regulations were a final agency action subject to pre-enforcement judicial review because they "purport to give an authoritative interpretation of a statutory provision" that puts drug companies in the dilemma of incurring massive compliance costs or risking criminal and civil penalties for distributing "misbranded" drugs. 387 U.S. at 152-53, 87 S. Ct. 1507.

—In *Frozen Food Express v. United States*, 351 U.S. 40, 76 S. Ct. 569, 100 L. Ed. 910 (1956), plaintiff sought judicial review of an Interstate Commerce Commission order declaring that certain agricultural commodities were not exempt from regulations requiring carriers to obtain a permit to transport. *Id.* at 41-42, 76 S. Ct. 569. As in this case, the order "would have effect only if and when a particular action was brought against a particular carrier." *Abbott Labs.*, 387 U.S. at 150, 87 S. Ct. 1507. The Court nonetheless held the order reviewable because the "determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact"; it "warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties." *Frozen Food Express*, 351 U.S. at 43-44, 76 S. Ct. 569. Here, the Revised JD is a determination regarding a specific property that has an even stronger coercive effect than the order deemed final in *Frozen Food Express*, which was not directed at any particular carrier. In *Port of Boston*, 400 U.S. at 70-71, 91 S. Ct. 203, the Court rejected as having "the hollow ring of another era" the contention that an "order lacked finality because it had no independent effect on anyone," citing *Frozen Food Express*.

—In *Columbia Broadcasting System v. United States*, 316 U.S. 407, 62 S. Ct. 1194, 86 L. Ed. 1563 (1942), the Court held that FCC regulations barring

the licensing of stations that enter into network contracts, though not self-executing, were subject to immediate review. "It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose application for licenses the regulations will cause to be rejected." *Id.* at 422, 62 S. Ct. 1194. Here, the Revised JD alters and adversely affects appellants' right to use their property in conducting a lawful business activity. The adverse effect is caused by agency action, not simply by the existence of the CWA. Though the Revised JD is not-self-executing, "the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction." *Sackett*, 132 S. Ct. at 1373.

2. The Corps argues, and the district court further concluded, that the Revised JD is not a final agency action "for which there is no other adequate [judicial] remedy " 5 U.S.C. § 704, because appellants have two other adequate ways to contest the Corps' jurisdictional determination in court—complete the permit process and appeal if a permit is denied, or commence peat mining without a permit and challenge the agency's authority if it issues a compliance order or commences a civil enforcement action. These other CWA remedies were held not to preclude judicial review of the EPA compliance order in *Sackett*, 132 S. Ct. at 1372.

In this case, the contention ignores the prohibitive cost of taking either of these alternative actions to obtain judicial review of the Corps' assertion of CWA jurisdiction over the property. First, as a practical matter, the permitting option is prohibitively expensive and futile. The Supreme Court reported in *Rapanos*, 547 U.S. at 721, 126 S. Ct. 2208, that the average applicant for an individual Corps permit "spends 788 days and $271,596 in completing the process." Moreover, the Amended Complaint alleged that the Corps' District representatives repeatedly made it clear to Kevin Pierce, to a Hawkes employee, and to the landowner that a permit to mine peat *would ultimately be refused.* In our view, this alone demonstrates that the second *Bennett* factor is satisfied. Moreover, even if appellants eventually complete the permit process, seek judicial review of the permit denial, and prevail, they can never recover the time and money lost in seeking a permit they were not legally obligated to obtain. *Cf. Iowa League of Cities v. EPA*, 711 F.3d 844, 868 (8th Cir. 2013).

Second, appellants' other option—commencing to mine peat without a permit and await an enforcement action—is even more plainly an inadequate remedy. Appellants "cannot initiate that process, and each day they wait for the agency to drop the hammer, they accrue" huge additional potential liability. *Sackett*, 132 S. Ct. at 1372. Because appellants were forthright in undertaking to obtain a permit, choosing now to ignore the Revised JD and commence peat mining

without the permit it requires would expose them to substantial criminal monetary penalties and even imprisonment for a knowing CWA violation. Thus, like the compliance order at issue in *Sackett*, the Revised JD increases the penalties appellants would risk if they chose to begin mining without a permit. *See* 33 U.S.C. § 1319(c).

The prohibitive costs, risk, and delay of these alternatives to immediate judicial review evidence a transparently obvious litigation strategy: by leaving appellants with no immediate judicial review and no adequate alternative remedy, the Corps will achieve the result its local officers desire, abandonment of the peat mining project, without having to test whether its expansive assertion of jurisdiction—rejected by one of their own commanding officers on administrative appeal—is consistent with the Supreme Court's limiting decision in *Rapanos*. For decades, the Corps has "deliberately left vague" the "definitions used to make jurisdictional determinations," leaving its District offices free to treat as waters of the United States "adjacent wetlands" that "are connected to the navigable water by flooding, on average, once every 100 years," or are simply "within 200 feet of a tributary." *Rapanos*, 547 U.S. at 727-28, 126 S. Ct. 2208, quoting a GAO report. The Court's decision in *Sackett* reflected concern that failing to permit immediate judicial review of assertions of CWA jurisdiction would leave regulated parties unable, as a practical matter, to challenge those assertions. The Court concluded that was

contrary to the APA's presumption of judicial review. "[T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction." 132 S. Ct. at 1374.

In our view, a properly pragmatic analysis of ripeness and final agency action principles compels the conclusion that an Approved JD is subject to immediate judicial review. The Corps's assertion that the Revised JD is merely advisory and has no more effect than an environmental consultant's opinion ignores reality. "[I]n reality it has a powerful coercive effect." *Bennett*, 520 U.S. at 169, 117 S. Ct. 1154. Absent immediate judicial review, the impracticality of otherwise obtaining review, combined with "the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case leaves most property owners with little practical alternative but to dance to the EPA's [or to the Corps'] tune." "In a nation that values due process, not to mention private property, such treatment is unthinkable." *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring). We conclude that an Approved JD

is a final agency action and the issue is ripe for judicial review under the APA.[2]

The judgment of the district court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

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[2] The question of ripeness "turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Pac. Gas & Elec. Co.*, 461 U.S. at 201, 103 S. Ct. 1713, quoting *Abbott Labs.*, 387 U.S. at 149, 87 S. Ct. 1507. The issues of ripeness and final agency action are distinct, but in this case, our analysis of the final agency action factors in *Bennett* resolves the ripeness issue as well.

KELLY, Circuit Judge, concurring.

I view whether a JD is reviewable under the APA as a close question. In *Sackett*, the Supreme Court concluded that a compliance order issued by the EPA "severely limits [petitioners'] ability to obtain a permit for their fill from the Army Corps of Engineers [because] [t]he Corps' regulations provide that, once the EPA has issued a compliance order with respect to certain property, the Corps will not process a permit application for that property unless doing so 'is clearly appropriate.'" *Sackett v. EPA*, __ U.S. __, 132 S. Ct. 1367, 1372, 182 L. Ed. 2d 367 (2012) (internal citation omitted) (quoting 33 C.F.R. § 326.3(e)(1)(iv)).[3] The record in the present case does not reveal that a similar impediment to receiving a permit exists once a JD has been issued. In *Sackett*, the Corps had a published policy regarding the decreased likelihood of receiving a permit; here, the record includes case-specific facts, such as informal comments made by Corps representatives, suggesting that a permit application made by Hawkes might be "futile." *See* Majority Opinion, *supra*, op. at 1001. However, I question how much weight should be given to the futility of

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[3] "No permit application will be accepted nor will the processing of an application be continued when the district engineer is aware of enforcement litigation that has been initiated by other Federal, state, or local regulatory agencies, unless he determines that concurrent processing of an after-the-fact permit application is clearly appropriate." 33 C.F.R. § 326.3(e)(1)(iv)

the permit application for an individual applicant, or the time and cost spent applying, in determining whether or not the JD constitutes a final agency action. If a JD is a final agency action, an applicant who is *likely* to obtain a permit would still be in a position to seek judicial review of the JD. Similarly, it must be the case that were the Corps to take steps to make the permit process both more efficient and less costly, the reviewability of the JD would not change.

I also note other differences between the compliance order in *Sackett* and the JD in the present case. A compliance order, once issued, begins the accumulation of penalties (potentially doubled) for each day the landowner remains in violation. *Id.* A JD, however, has no such penalty scheme. Indeed, 33 U.S.C. § 1319(d), the CWA's enforcement section on civil penalties, makes no mention of JDs. While the existence of a JD may affect a court's assessment of a party's "good faith" while determining civil penalties, I agree with the other courts that have considered this issue that any penalties resulting from a JD are far more "speculative" than those threatened in *Sackett*. *Belle Co., LLC v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 392 (5th Cir. 2014); *see also, Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 595 (9th Cir. 2008). The Appellants fail to point to a single case in which increased civil penalties were levied against a party for ignoring a JD.

Despite these dissimilarities with the circumstances in *Sackett*, I agree that Hawkes is left without acceptable options to challenge the JD, absent judicial review. Hawkes's choice is to either (1) follow through on their peat-mining plans until either the EPA issues a compliance order or the Corps commences an enforcement action, to both of which Hawkes could raise lack of CWA jurisdiction as a defense; or (2) apply for a permit (on the grounds that no permit is required) and, if the application is denied, appeal the denial in court. But what happens if Hawkes is, after all, granted a permit yet maintains it never needed one in the first place? It must decline the permit and challenge the original jurisdiction in court. This roundabout process does not seem to be an "adequate remedy" to the alternative of simply allowing Hawkes to bring the jurisdictional challenge in the first instance and to have an opportunity to show the CWA does not apply to its land at all.

In my view, the Court in *Sackett* was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction—a threshold determination that puts the administrative process in motion. This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property. This jurisdictional determination was precisely what the Court deemed reviewable in *Sackett*. *See Sackett*, 132 S. Ct.

at 1374-75 (Ginsburg, J., concurring). Accordingly, I concur in the judgment of the court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Civil No. 13-107 ADM/TNL

HAWKES CO., INC., PIERCE INVESTMENT CO., AND LPF PROPERTIES, LLC, PLAINTIFFS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, DEFENDANT

Aug. 1, 2013

MEMORANDUM OPINION AND ORDER

ANN D. MONTGOMERY, District Judge.

I. INTRODUCTION

On July 9, 2013, the undersigned United States District Judge heard oral argument on Defendant United States Army Corps of Engineers' (the "Corps") Motion to Dismiss [Docket No. 11]. Plaintiffs Hawkes Co., Inc. ("Hawkes"), Pierce Investment Co. ("Pierce"), and LPF Properties, LLC ("LPF") filed this action seeking a declaratory judgment and injunctive relief to challenge a jurisdictional determination

made by the Corps under the Clean Water Act ("CWA"). For the reasons stated herein, the Corps' motion is granted.

II. BACKGROUND

Plaintiffs Pierce and LPF own a 530 acre parcel of land in Marshall County, Minnesota (the "Property"). The Property contains peat, and because peat forms in wetlands, the Property is necessarily considered a wetland. Am. Compl. [Docket No. 7] ¶¶ 6, 7, 27. Plaintiff Hawkes seeks permission to mine peat from the Property for use in the construction of golf greens. Hawkes is already mining peat from nearby land, and intends to pay royalties to Pierce and LPF in exchange for permission to expand its mining operation onto the Property. All three companies are closely-held corporations owned by members of the Pierce family, and Kevin Pierce is an officer in all of the companies. *Id.* ¶¶ 8, 32-33.

On March 20, 2007, Kevin Pierce, representing Hawkes, met with the Corps and the Minnesota Department of Natural Resources ("MDNR") to discuss Hawkes' plan to mine peat on the Property. On January 15, 2008, the parties met again. At this second meeting, Hawkes informed the Corps and MDNR that the high quality peat available on the Property could support Hawkes' mining operation for another 10 to 15 years. *Id.* ¶¶ 35-37.

The CWA prohibits the discharge of materials into "navigable waters," which is broadly defined as "waters of the United States." 33 U.S.C. §§ 1251(a), 1311(a), 1362(6). The Corps has interpreted the term "waters of the United States" to include wetlands adjacent to navigable waters. The Supreme Court has affirmed this interpretation. *See* 33 C.F.R. § 328.3; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985). The Corps has authority under the CWA to issue permits for the discharge of dredged or fill materials into navigable waters, including wetlands. *See* 33 U.S.C. § 1344. The Corps has also promulgated regulations which govern its decisionmaking processes in connection with CWA permits. *See* 33 C.F.R. § 320.1, et seq.

Hawkes' intended mining operation involves the filling or discharge of materials onto the Property. As a result, in December 2010, Hawkes applied for a permit from the Corps to begin mining. In January 2011, the parties met to discuss Plaintiffs' plans. The Corps attempted to dissuade Plaintiffs from expanding their mining operations, in part by stressing the time and cost involved in the permitting process. Am. Compl. ¶ 40.

On March 15, 2011, the Corps by letter informed Hawkes it had tentatively determined that the Property was connected to Red River of the North, a "water of the United States," and thus regulated by the

Corps under the CWA. Over the next several months, the parties met several times, and the Corps conducted a site visit of the Property. In connection with the permitting process, the Corps also requested Plaintiffs conduct a series of assessments relating to the Property, which Plaintiffs estimate will cost about $100,000. Am. Compl. ¶¶ 41-46, Exs. A, B.

On November 8, 2011, the Corps sent Plaintiffs a preliminary version of its jurisdictional determination for the Property (sometimes referred to as the "JD"). The preliminary JD stated that CWA jurisdiction existed over the Property because it was a wetland connected to a "relatively permanent water," which in turn connected to the Red River of the North, a navigable water.[1] Plaintiffs responded by letter, arguing

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[1] For jurisdiction to exist under the CWA, the wetland at issue must have some connection to a "traditionally navigable water." The nature of this connection is somewhat in dispute due to *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006). In *Rapanos*, the four justice plurality opinion held that for jurisdiction to exist under the CWA, the wetland must connect to a traditionally navigable water by "relatively permanent, standing or continuously flowing bodies of water." *Id.* at 739, 126 S. Ct. 2208. Justice Kennedy, in a concurring opinion, wrote that jurisdiction exists if the wetland has a "significant nexus" to traditional navigable waters. *Id.* at 778, 126 S. Ct. 2208; *see also Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001).

The Eighth Circuit Court of Appeals has held that either test can establish CWA jurisdiction. *United States v. Bailey*, 571 F.3d

no jurisdiction existed because the Property did not connect to a "relatively permanent water." Am. Compl. ¶ 49.

On February 7, 2012, the Corps issued an Approved Jurisdictional Determination (the "Approved JD") in which it apparently abandoned the "relatively permanent water" rationale and instead concluded a "significant nexus" existed between the Property and the Red River of the North. An "approved jurisdictional determination" is the first formal decision the Corps makes with regard to jurisdiction, and it is appealable to a "Review Officer" within the agency. *See* 33 C.F.R. §§ 331.2, 331.3.

On April 4, 2012, in accordance with CWA regulations, Plaintiffs appealed the Approved JD to the designated Corps Review Officer. Am. Compl. ¶ 51. On October 24, 2012, the Corps issued an appellate decision in which it rejected several of the Plaintiffs' appeal arguments. However, the appeal concluded that the Corps had failed to evaluate the Property's chemical, physical, and biological effects on the Red River of the North, and thus had not established a significant

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791, 799 (8th Cir. 2009). The Environmental Protection Agency and the Corps have similarly issued informal guiding documents in which they have stated an intent to exercise jurisdiction under both tests. *See* U.S. Army Corps of Engineers, *Clean Water Act Jurisdiction Following U.S. Supreme Court's Decision in Rapanos* (Dec. 2, 2008), *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/cwa_juris_2dec08.pdf.

nexus. As a result, the JD was remanded to the St. Paul District of the Corps for further factfinding. *Id.* at Ex. C.

On December 31, 2012, the Corps issued a Revised Approved Jurisdictional Determination (the "Revised JD") in which it again concluded CWA jurisdiction existed. *Id.* at ¶ 54. The Corps informed Plaintiffs that the Revised JD constituted the "final Corps approved jurisdictional decision," meaning no further appeals of jurisdiction could be taken. Cameron Decl. [Docket No. 13] Ex. 1. On January 11, 2013, Plaintiffs filed this action seeking review of the Revised JD.

III. DISCUSSION

A. Motion to Dismiss Standard

Rule 12 of the Federal Rules of Civil Procedure states that a party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P 12(b)(6). The court construes the pleadings in the light most favorable to the nonmoving party, and the facts alleged in the complaint must be taken as true. *Hamm v. Groose*, 15 F.3d 110, 112 (8th Cir. 1994) (citation omitted). And although the court may not consider matters outside the pleadings at this stage, "documents necessarily embraced by the complaint are not matters outside the pleading[s]." *Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2012) (quotation omitted).

B. Review of Final Agency Actions

Under the Administrative Procedure Act (APA), "agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. For an agency action to be considered "final," it must satisfy two conditions. First, the action must "mark the consummation of the agency's decisionmaking process," meaning it must be more than "tentative or interlocutory" in nature. *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (quotations and citations omitted). Second, the action must be one "by which rights or obligations have been determined," or one from which "legal consequences will flow." *Id.* at 178, 117 S. Ct. 1154.

The parties do not dispute that Plaintiffs here could obtain judicial review by pursuing the permitting process, as Corps regulations expressly make the final permit decision reviewable under the APA. *See* 33 C.F.R. § 331.12. However, Plaintiffs argue that by itself, a jurisdictional determination qualifies as a "final agency action" subject to immediate judicial review.

C. Judicial Review of Jurisdictional Determinations

Although no Eighth Circuit court has yet ruled on the issue, several other federal courts have held that a jurisdictional determination is not a "final agency action," and thus not subject to immediate judicial

review. *See, e.g., Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586 (9th Cir. 2008); *Greater Gulfport Props., LLC v. U.S. Army Corps of Eng'rs*, 194 Fed. Appx. 250 (5th Cir. 2006) (unpublished); *Coxco Realty, LLC v. U.S. Army Corps of Eng'rs*, No. 3:06-cv-416-s, 2008 WL 640946, at *4-5 (W.D. Ky. Mar. 4, 2008); *Hampton Venture No. One v. United States*, 768 F Supp. 174, 175-76 (E.D. Va. 1991); *St. Andrews Park, Inc. v. U.S. Dep't of Army Corps of Eng'rs*, 314 F Supp. 2d 1238, 1244-45 (S.D. Fla. 2004); *Child v. United States*, 851 F Supp. 1527, 1534-35 (D. Utah 1994); *Lotz Realty Co. v. United States*, 757 F Supp. 692, 695-98 (E.D. Va. 1990); *Acquest Wehrle LLC v. United States*, 567 F Supp. 2d 402, 409-411 (W.D.N.Y. 2008); *Belle Co., LLC v. U.S. Army Corps of Eng'rs*, No. 12-247-BAJ-SCR, 2013 WL 773730, at *2-4 (M.D. La. Feb. 28, 2013).

Fairbanks illustrates the above-cited cases' reasoning for denying judicial review of jurisdictional determinations. Like Plaintiffs in this case, the plaintiff in *Fairbanks* sought judicial review after the Corps issued an approved jurisdictional determination for the wetlands at issue. *Fairbanks*, 543 F.3d at 593-94. In deciding whether a jurisdictional determination is a "final agency action," the Ninth Circuit Court of Appeals found that while the first *Bennett* condition was satisfied, the second was not. The court also concluded that the jurisdictional determination did not impair the plaintiff's ability to seek judicial review

through the permitting process. *See Bennett*, 520 U.S. at 177-78, 117 S. Ct. 1154; 5 U.S.C. § 704.

Considering the first *Bennett* condition, the Ninth Circuit held that the plaintiff's jurisdictional determination represented a consummation of the Corps' decisionmaking process. The court reasoned that when the Corps issues a jurisdictional determination and upholds it on administrative appeal, the Corps itself treats the determination as "final" and will not reopen it absent new information supporting a revision. *Fairbanks*, 543 F.3d at 592. The Ninth Circuit also found that Corps regulations treat the jurisdictional determination as a separate administrative process from the subsequent permit decision, with the latter being initiated at-will by the permit applicant. Practically speaking, when an applicant requests a permit, his application does not reopen or otherwise disturb the Corps' earlier jurisdiction decision. *Id.* at 593. As a result, the *Fairbanks* court held that the jurisdictional determination satisfied the first *Bennett* condition.

However, the Ninth Circuit ultimately held that a jurisdictional determination was not a "final agency action"—and thus not subject to immediate judicial review—because it did not alter a party's rights or obligations. *See id.* at 591-94. A jurisdictional determination, the court held, "does not itself command [a party] to do or forbear anything; as a bare statement of the agency's opinion, it can be neither the

subject of 'immediate compliance' nor of defiance." *Id.* at 591-92 (citation omitted). A finding of jurisdiction in this context, the court held, is akin to recognizing already-existing facts about the nature of the wetlands at issue. When the Corps finds jurisdiction, it "does not alter physical reality or the legal standards used to assess that reality." *Id.* at 594. In other words, the Corps' jurisdictional determination clarifies a plaintiff's position but does not alter it. As a result, the jurisdictional determination fails the second *Bennett* condition, and the determination is not subject to judicial review.

As part of its analysis, the Ninth Circuit briefly noted its holding did not impair the plaintiff's ability to challenge CWA jurisdiction. *Id.* at 594-95. The plaintiff could still challenge jurisdiction when judicial review was appropriate, such as in connection with a permit application or an enforcement proceeding. *See id.* As a result, the plaintiff was not without "other adequate remedy in a court." *See id.*; 5 U.S.C. § 704.

D. Plaintiffs' Appeal of the Revised Jurisdictional Determination

As discussed below, Plaintiffs' jurisdictional determination satisfies the first *Bennett* condition, but not the second.

1. Consummation of the Agency's Decisionmaking Process

The Corps argues *Fairbanks* reached the correct end result, but disagrees with the Ninth Circuit's conclusion that a jurisdictional determination marks the consummation of the agency's decisionmaking process. Instead, the Corps urges the Court to view jurisdictional determinations as the beginning, or at least as some non-definitive, stage of the permit process. In response, Plaintiffs note that *Fairbanks*, a case on which the Corps relies, held that a jurisdictional determination was the consummation of a Corps decisionmaking process. Plaintiffs further argue the language of Corps regulations themselves indicate an intent to treat jurisdictional determinations as final.

Plaintiffs' jurisdictional determination marked the consummation of the Corps' decisionmaking process, and as such satisfies the first *Bennett* condition. Despite the Corps' argument to the contrary, the jurisdictional determination process is not—as this case demonstrates—necessarily contiguous with a permit application process. Here, Plaintiffs received the Revised JD but have not yet decided whether to pursue a permit. At this point, Plaintiffs could choose to abandon their mining operation. If that were to occur, Plaintiffs would not have abandoned the administrative process at a midpoint. The Corps' jurisdictional determination would remain in place regardless of future operations, changes in ownership, or complete

inactivity on the Property. The only ways in which the Revised JD could be altered would be if: (1) new information surfaced regarding the Property, or (2) a party later successfully challenged jurisdiction in connection with a permit application or enforcement action. The jurisdictional determination is thus a discrete decision.

The possibility of the Corps revising its jurisdictional determination does not, as the Corps urges, transform this determination into an advisory opinion. The Ninth Circuit in *Fairbanks* concluded that the possibility of new information arising did not suggest that the determination "might be subject to subsequent revision consideration or modification." *Fairbanks*, 543 F.3d at 592 & n.4; *see also Coxco*, 2008 WL 640946, at *5 (holding jurisdictional determination may mark consummation of jurisdiction decisionmaking process). In other administrative and judicial contexts, a final decision may be reopened if new information comes to light. *See, e.g.*, Fed. R. Crim. P 33(b)(1) (governing motion for new trial based on newly discovered evidence); 20 C.F.R. § 404.989 (allowing for reopening of otherwise final Social Security benefits decisions based on new evidence or showing of error). But, for very practical and equitable reasons, the chance of new information altering a final decision does not justify treating the decision as entirely advisory. That is also the case here.

The language of Corps regulations further supports this conclusion. The Corps concedes CWA regulations describe a jurisdictional determination as "a Corps final agency action." 33 C.F.R. § 320.1(a)(6). However, the Corps argues that this language does not mean the Corps views jurisdictional determinations as final for APA purposes, but rather only as "final" in the sense the public may rely on the determination.[2] *See* Final Rule for Regulatory Programs of the Corps of Engr's, 51 Fed. Reg. 41,206, 41,207 (Nov. 13, 1986). The Corps' argument, as Plaintiffs note, actually supports viewing jurisdictional determinations as the consummation of a decisionmaking process. If a jurisdictional determination is "final" in the sense the public may rely on it, the determination must be more definitive than an advisory opinion.

2. Determines a Party's Rights or Obligations

Although Plaintiffs' Revised JD may mark the consummation of a Corps' decisionmaking process, it does not determine Plaintiffs' rights or obligations, and thus does not satisfy the second *Bennett* condition. Plaintiffs argue *Bennett* stressed the practical nature of its articulated finality test, focusing on the legal consequences of the agency decision even if the decision itself did not expressly alter legal rights. *See Ben-*

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[2] This argument also reflects the overall regulatory scheme, as 33 C.F.R. § 331.12 states administrative remedies have not been exhausted for APA purposes until a final permit decision is reached under § 331.10.

nett, 520 U.S. at 169-70, 117 S. Ct. 1154. Because the Corps has found jurisdiction, Plaintiffs argue, their options have narrowed to a set of difficult alternatives. Plaintiffs may proceed with mining and risk substantial liability; they may seek a permit through a lengthy and costly process; or they may abandon their mining plans altogether. As a result, Plaintiffs argue the Revised JD has materially altered their legal position. The Corps responds by arguing, as *Fairbanks* held, that jurisdictional determinations do not alter a party's legal obligations so much as mark the boundaries for future decisions.

Plaintiffs' jurisdictional determination does not fix their rights or obligations. The Revised JD does not order Plaintiffs to take any kind of action. Although Plaintiffs may want to obtain a permit if they wish to expand their mining operations, the Corps has in no way obligated them to do so. *See Fairbanks*, 543 F.3d at 594; *St. Andrews*, 314 F Supp. 2d at 1244-45; *Belle*, 2013 WL 773730, at *4. While Plaintiffs do have a difficult choice to make regarding how to proceed, their options did not substantially change because of the jurisdictional determination. The Property is undisputedly a wetland, and it has a potential connection to a navigable water. The Revised JD did not change these physical characteristics. Nor did it affect the legal standards used by agencies and courts in determining where the CWA applies. Even if Plaintiffs had never approached the Corps, Plaintiffs would have still needed to decide whether to begin

mining on a wetland possibly protected by the CWA or to pursue a permit. As a result, the Revised JD does not satisfy the second *Bennett* condition.

E. Compliance Orders and *Sackett*

Neither Plaintiffs nor the Court have identified a single decision contrary to the holding of *Fairbanks* and the other cases cited above. However, Plaintiffs argue the Supreme Court's recent holding in *Sackett v. EPA*, __ U.S. __, 132 S. Ct. 1367, 182 L. Ed. 2d 367 (2012), overruled these decisions.[3] Without obtaining a jurisdictional determination or permit, the petitioners in *Sackett* filled rocks and dirt onto part of their residential lot in preparation for building a house. In response, the EPA issued a compliance order in accordance with 33 U.S.C. § 1319.[4] In the compliance order, the EPA determined that the petitioners' property fell under CWA jurisdiction, and also that the

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[3] The Court in *Belle*, 2013 WL 773730, at *4, specifically distinguished *Sackett*, holding jurisdictional determinations did not have the binding effect of compliance orders. Nevertheless, Plaintiffs argue *Belle* reached the wrong result, and that *Sackett* applies here.

[4] The EPA and the Corps have concurrent jurisdiction to enforce the CWA. The EPA has the authority under the Act to issue compliance orders, binding decisions which the EPA can then choose to enforce in court by bringing an enforcement action. *See* 33 U.S.C. § 1319(a, b). Prior to *Sackett*, courts had held that a party subject to a compliance order had no judicial recourse until the EPA brought a civil action to enforce the order. *See, e.g., Hoffman Grp. v. EPA*, 902 F.2d 567, 569-70 (7th Cir. 1990).

petitioners had violated the Act. *Id.* at 1370-71. The petitioners sought review of the compliance order, arguing it was a "final agency action" under Chapter 7 of the APA and thus subject to judicial review.

The Supreme Court sided with the petitioners. The Court held the compliance order bore the hallmarks of a "final agency action" under the two *Bennett* conditions. First, the compliance order marked the consummation of the EPA's decisionmaking process, because the petitioners were not entitled to any further administrative review. *Id.* at 1372. Second, the compliance order determined the petitioners' rights and obligations. The order legally obligated the petitioners to "restore" their land in accordance with an EPA restoration plan, it required them to provide the EPA with access to the property, and it required them to provide EPA employees with "access and documentation related to the conditions of the site." *Id.* at 1371 (citation omitted). If the petitioners did not comply, they would immediately risk accruing substantial, daily penalties. *Id.* at 1372. In addition, the Court noted that Corps regulations made it substantially more difficult for the petitioners to obtain a permit after receiving a compliance order. *Id.* (citing 33 C.F.R. § 326.3(e)(1)(iv)).

1. *Bennett* Conditions Under *Sackett*

Plaintiffs argue the Revised JD satisfies the same criteria for a "final agency action" as the compliance order reviewed by the Supreme Court in *Sackett*. As

a result, Plaintiffs argue the Court should extend *Sackett's* holding to apply to all final CWA jurisdictional determinations as well. The Corps responds that *Fairbanks* and the other above-cited cases have correctly stated the law, and that because jurisdictional determinations are distinguishable from compliance orders, *Sackett* should have no effect here. Plaintiffs are unable to demonstrate how *Sackett* applies to jurisdictional determinations.

As discussed above, the jurisdictional determination satisfies the first *Bennett* condition.[5] With regard to the second *Bennett* condition, however, Plaintiffs' Revised JD is distinguishable from the petitioners' compliance order in *Sackett*. The compliance order demanded the petitioners restore their property in accordance with a restoration plan set by the EPA, and grant the EPA access to both the land and records at issue. *Sackett*, 132 S. Ct. at 1371-72. If the petitioners chose to disobey the compliance order, they risked accruing up to $75,000 per day in penalties, which the EPA could recover if it subsequently prevailed in an enforcement action. *Id.* at 1370.

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[5] Regarding the first *Bennett* condition, *Sackett* and *Fairbanks* actually adopt the same reasoning in concluding a compliance order and a jurisdictional determination mark the consummations of their respective decisionmaking processes. *Sackett* held the "mere possibility" of an agency revisiting and revising its original decision based on new information does not "suffice to make an otherwise final agency action nonfinal." *Sackett*, 132 S. Ct. at 1372. As discussed above, *Fairbanks* held in agreement on this point.

As discussed above in Section III.D.2., Plaintiffs face no such obligations or changes in their rights as a result of their jurisdictional determination. Plaintiffs attempt to avoid this conclusion by arguing the threat of liability comprises a material change in their legal obligations, just as it did for the petitioners in *Sackett*. *See Sackett*, 132 S. Ct. at 1371. If Plaintiffs forgo the costly permit process and begin mining, they argue, they will face the risk of the Corps suing them. However, the compliance order in *Sackett* "started the clock" on the petitioners' exposure to liability, adding potentially tens of thousands of dollars per day in penalties pending restoration of the property. *See id.* In this case, the jurisdictional determination has not exposed Plaintiffs to liability, nor made any demands of them. And if an enforcement action was brought against them, Plaintiffs would not face substantial—and automatically accrued—liability for their actions.[6] Thus, the "specter of potential liability" was

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[6] At the hearing, Plaintiffs argued that proceeding without a permit when the Corps has already determined jurisdiction could put Plaintiffs at risk of steeper penalties and even criminal liability if the Corps succeeded in an enforcement action, because violating the CWA after gaining knowledge of CWA jurisdiction could demonstrate Plaintiffs' bad faith. Whether a particular agency action may be used as evidence against a party in a subsequent proceeding does not amount to a change in that party's rights or obligations, nor is it fairly characterized as a legal consequence. *See Fairbanks*, 543 F.3d at 595 ("[T]he possibility that Fairbanks might someday face a greater risk of increased fines should it proceed without regard to the Corps' assertion of jurisdiction does not

much more concrete for the petitioners in *Sackett* than it is here. Pls.' Mem. Opp. [Docket No. 26] 23; *see Lotz*, 757 F Supp. at 696 (holding the permitting process did not impose the sort of "immediate and devastating consequences" which might amount to a determination of rights or obligations).

Also unlike the petitioners in *Sackett*, Plaintiffs may pursue a permit without a disadvantage. The compliance order "severely" limited the petitioners' ability to obtain a permit from the Corps. *Sackett*, 132 S. Ct. at 1372. Here, the jurisdictional determination has not affected Plaintiffs' ability to pursue a permit. And Plaintiffs' description of the permit process as an unending, unreasonably expensive procedural nightmare is unpersuasive. Undoubtedly, pursuing a permit comes at a significant price, and it will take time before Plaintiffs may challenge the Revised JD through this process. But, as another court held in a relevant context, "[t]he possibility that an agency may make an error that is beyond the effective reach of a court is part of the price we pay for the advantages of an administrative process." *Thermal Ecology Must be Preserved v. Atomic Energy Comm'n*, 433 F.2d 524, 526 (D.C. Cir. 1970). Although Plaintiffs might prefer a faster or less expensive way to challenge the Revised JD, the law views the permitting process as a proper procedural juncture to access judicial review in con-

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constitute a *legal* consequence of the approved jurisdictional determination.") (emphasis original).

nection with the CWA. *See, e.g., Fairbanks*, 543 F.3d at 594-95.

2. Adequacy of Judicial Remedies

In addition to considering the *Bennett* conditions, *Sackett* also considered whether the petitioners were left without "other adequate remedy in a court." *Id.* at 1372 (quoting 5 U.S.C. § 704). Generally, the party seeking to alter wetlands subject to the CWA may seek judicial review by one of two methods. First, he may proceed with the planned development or other alteration without consulting the Corps or the EPA. The EPA may then choose to bring an enforcement action against him, which would bring the party into court. *See* 33 U.S.C. § 1319; 33 C.F.R. §§ 326.3, 326.5. The Court in *Sackett* rejected this option, holding that waiting to be sued while incurring potentially significant penalties was not a sufficient remedy. *See generally Sackett*, 132 S. Ct. at 1372-74.

Second, the party may apply for a permit from the Corps, and if the permit is denied through the administrative process, he may file suit. *See* 33 C.F.R. §§ 331.10, 331.12. The Supreme Court held that this was not an adequate remedy for the petitioners in *Sackett*, because the EPA, a separate agency, had already issued a compliance order. *Id.* at 1372 ("The remedy for denial of action that might be sought from one agency does not ordinarily provide an 'adequate remedy' for action already taken by another agency.").

Neither of these "dead ends" apply to Plaintiffs. First, unlike the petitioners in *Sackett*, Plaintiffs are not at the mercy of the Corps while they continue to accrue liability. On the contrary, Plaintiffs may choose if future administrative proceedings regarding the Property will occur and Plaintiffs will not accrue liability in the meantime. Unlike the petitioners, Plaintiffs have the ability to "initiate [the] process" which will bring them before the Court. *See Sackett*, 132 S. Ct. at 1372.

Regarding the second remedy, as noted, Plaintiffs have the unhindered option of pursuing a permit from the Corps. Both *Sackett* and *Fairbanks* viewed the permit process as a proper avenue after which judicial review of agency action under the CWA was appropriate. *See Sackett*, 132 S. Ct. at 1372; *Fairbanks*, 543 F.3d at 594-95; *see also Coxco*, 2008 WL 640946, at *5. *Sackett* found the permit process inadequate only because it would not serve to remedy the compliance order already issued by the EPA, a separate agency. *Sackett*, 132 S. Ct. at 1372. In this case, Plaintiffs face no such dilemma.

Finally, Plaintiffs now have a third avenue to judicial review. If Plaintiffs choose to begin mining without a permit and the government issues a compliance order, Plaintiffs may, as a result of *Sackett's* holding, seek immediate judicial review of the compliance order and resolve the status of their operations. Because the Revised JD does not satisfy both *Bennett* condi-

tions, and because Plaintiffs have "other adequate remedy in a court," the determination is not reviewable at this time.

F. Ripeness

Both parties offer brief arguments regarding why the doctrine of ripeness might also determine the outcome of this motion. Because the Court holds judicial review is not appropriate for the reasons stated above, it declines to reach the issue of ripeness.

IV CONCLUSION

Based on the foregoing, and all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendant's Motion to Dismiss [Docket No. 11] is **GRANTED**; and,

2. All claims in the Amended Complaint [Docket No. 7] are **DISMISSED.**

LET JUDGMENT BE ENTERED ACCORDINGLY

APPENDIX C

[SEAL OMITTED]

DEPARTMENT OF THE ARMY
ST. PAUL DISTRICT, CORPS OF ENGINEERS
180 FIFTH STREET EAST, SUITE 700
ST. PAUL MN 55101-1678

REPLY TO ATTENTION OF

Operations

Regulatory (2007-01914-DJS) Dec. 31, 2012

Mr. Kevin Pierce
Hawkes Peat Company
P.O. Box 14111
Grand Forks, North Dakota 58208

Dear Mr. Pierce:

The U.S. Army Corps of Engineers, St. Paul District (District) has completed our reevaluation of the approved jurisdictional determination (AJD) issued to you on February 7, 2012 in accordance with the appeal decision provided by the Mississippi Valley Division Commander on October 24, 2012. As you are aware, the Division Commander remanded the case back to the District for reconsideration and reevaluation of our determination that the wetlands on your property along with other similarly situated wetlands adjacent to the tributary have a significant effect on the chemi-

cal, biological, and physical integrity of the Red River of the North. Based on our reevaluation, we have affirmed our previous determination that the wetlands on your property have a significant nexus with the Red River of the North and are thus waters of the United States. A copy of the revised AJD is provided for your records.

The District Engineer's decision made pursuant to the Division Engineer's remand of the appealed action becomes the final Corps permit decision in accordance with 33 C.F.R. 331.10.

If you have any questions, contact Dan Seemon in our St. Paul office at (651) 290-5380. In any correspondence or inquiries, please refer to the Regulatory number shown above.

Sincerely,

/s/ KELLY [ILLEGIBLE]
[*for*] TAMARA E. CAMERON
Chief, Regulatory Branch

Copy furnished:

T. Acuff, CEMVD-PD-KM

EXECUTIVE SUMMARY
MVP RESPONSE TO REMAND OF APPROVED JURISDICTIONAL DETERMINATION, CORPS FILE NUMBER MVP-2007-01914-DJS
(HAWKES PEAT COMPANY, INC.)

BACKGROUND

Mr. Kevin Pierce appealed the approved jurisdictional determination (AJD) prepared by the St. Paul District Regulatory Branch (District). Mr. Pierce alleged that a significant nexus does not exist between the 155 acres of wetlands on his property and the Red River of the North.

On October 24, 2012 the Division Commander issued a decision on the appeal and remanded the case back to the District for reconsideration. The remand directed the District to review the administrative record and its decision that the wetlands on Mr. Pierce's property along with other similarly situated wetlands adjacent to the tributary has a significant effect on the chemical, physical, and biological integrity of the Red River of the North. chemical, physical, or biological integrity of the Red River of the North.

ACTION REQUIRED

OP-R staff has completed the additional analyses and reviews in accordance with the remand and has determined that the wetlands located on Mr. Pierce's property have a significant effect on the chemical, physical, and biological integrity of the Red River of the North.

A revised and updated AJD has been prepared and will be transmitted to Mr. Pierce. A copy of the transmittal letter and the revised AJD will be provided to CEMVDPD-KM (Tonya Acuff) in accordance with the instructions from the Division Commander.

Pursuant to our regulations, the final Corps decision is the District Engineer's decision made pursuant to the Division Engineer's remand of the appealed action.

APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD):

B. ST PAUL, MN DISTRICT OFFICE, FILE NAME, AND NUMBER: 2007-01914-DJS, Hawkes Peat, Mercil Site

C. PROJECT LOCATION AND BACKGROUND INFORMATION:

State: Minnesota

County/parish/borough: Marshall

City: Newfolden

Center coordinates of site (lat/long in degree decimal format): Lat. 48.417373° N, Long. -96.272519° W

Universal Transverse Mercator: Zone 16

Name of nearest waterbody: Unnamed tributary to the Middle River

Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: Red River of the North

Name of watershed or Hydrologic Unit Code (HUC): 09020309

☒ Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.

☐ Check if other sites (e.g., offsite mitigation sites, disposal sites, etc...) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

☒ Office (Desk) Determination. Date: 12/20/2011

☒ Field Determination. Date(s): 6/1/2011 & 12/1/2011

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There **Are no** "*navigable waters of the U.S.*" within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [*Required*]

☐ Waters subject to the ebb and flow of the tide.

☐ Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. Explain:

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There Are "*waters of the U.S.*" within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [*Required*]

1. **Waters of the U.S.**

   a. **Indicate presence of waters of U.S. in review area (check all that apply):**[1]

   ☐ TNWs, including territorial seas

   ☐ Wetlands adjacent to TNWs

   ☐ Relatively permanent waters[2] (RPWs) that flow directly or indirectly into TNWs

   ☐ Non-RPWs that flow directly or indirectly into TNWs

   ☐ Wetlands directly abutting RPWs that flow directly or indirectly into TNWs

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[1] Boxes checked below shall be supported by completing the appropriate sections in Section III below.

[2] For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).

☐ Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs

☒ Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs

☐ Impoundments of jurisdictional waters

☐ Isolated (interstate or intrastate) waters, including isolated wetlands

b. **Identity (estimate) size of waters of the U.S. in the review area:**

Non-wetland waters: linear feet: width (ft) and/or acres. Wetlands: 155 acres.

c. **Limits (boundaries) of jurisdiction** based on: **Not established at this time.** Elevation of established OHWM (if known):

2. **Non-regulated waters/wetlands (check if applicable):**[3]

☐ Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional. Explain:

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[3] Supporting documentation is presented in Section III.F

SECTION III: CWA ANALYSIS

A. TNWs AND WETLANDS ADJACENT TO TNWs

The agencies will assert jurisdiction over TNWs and wetlands adjacent to TNWs. If the aquatic resource is a TNW, complete Section III.A.1 and Section III.D.1 only; if the aquatic resource is a wetland adjacent to a TNW, complete Sections III.A.1 and 2 and Section III.D.1.; otherwise, see Section III.B below.

1. **TNW**
   Identify TNW:

   Summarize rationale supporting determination:

2. **Wetland adjacent to TNW**
   Summarize rationale supporting conclusion that wetland is "adjacent":

B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):

This section summarizes information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps determine whether or not the standards for jurisdiction established under *Rapanos* have been met.

The agencies will assert jurisdiction over non- navigable tributaries of TNWs where the tributaries are "relatively permanent waters" (RPWs), i.e. tribu-

taries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months). A wetland that directly abuts an RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip to Section III.D.2. If the aquatic resource is a wetland directly abutting a tributary with perennial flow, skip to Section III.D.4.

A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

If the waterbody[4] is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the waterbody has a significant nexus with a TNW. If the tributary has adjacent wetlands, the significant nexus evaluation must consider the tributary in combination with all of its adjacent wetlands. This significant nexus

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[4] Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.

evaluation that combines, for analytical purposes, the tributary and all of its adjacent wetlands is used whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both. If the JD covers a tributary with adjacent wetlands, complete Section III.B.1 for the tributary, Section III.B.2 for any onsite wetlands, and Section III.B.3 for all wetlands adjacent to that tributary, both on-site and offsite. The determination whether a significant nexus exists is determined in Section III.C below.

1. **Characteristics of non-TNWs that flow directly or indirectly into TNW**

   (i) **General Area Conditions:**

   Watershed size: **785 square miles**

   Drainage area: **2.4 square miles**

   Average annual rainfall: **21.2 inches**

   Average annual snowfall: **46.7 inches**

   (ii) **Physical Characteristics:**

   (a) Relationship with TNW:

   ☐ Tributary flows directly into TNW.

   ☒ Tributary flows through 2 tributaries before entering TNW

   Project waters are 30 (or more) river miles from TNW.

Project waters are 1 (or less) river miles from RPW.

Project waters are 30 (or more) aerial (straight) miles from TNW

Project waters are 1 (or less) aerial (straight) miles from RPW.

Project waters cross or serve as state boundaries. Explain:

Identify flow route to TNW[5]: The wetlands in the review area discharge to a man-made non-jurisdictional drainage feature that flows approximately 512 feet to an unnamed tributary to the Middle River. The tributary then flows to the Middle River a perennial tributary of the Red River, a navigable water of the U.S. (TNW).

Tributary stream order, if known: 1st.

(b) General Tributary Characteristics (check all that apply):

Tributary is: ☒ Natural

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[5] Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.

☐ Artificial (man-made). Explain:

☐ Manipulated (man-altered). Explain:

Tributary properties with respect to top of bank (estimate):

Average width: **10 feet**

Average depth: **3 feet**

Average side slopes: **2:1.**

Primary tributary substrate composition (check all that apply):

☐ Silts	☒ Sands	☐ Concrete
☒ Cobbles	☒ Gravel	☐ Muck
☐ Bedrock	☒ Vegetation. Type/% cover: non-vegetated	
☐ Other. Explain:		

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain: Natural erosion.

Presence of run/riffle/pool complexes. Explain: Flow in the channel was not

observed during the December 1, 2011 site visit. The District was not able to determine if riffle/pool complexes were present in the tributary.

Tributary geometry: **Meandering**

Tributary gradient (approximate average slope): 1 %

(c) Flow:

Tributary provides for: **Seasonal flow**

Estimate average number of flow events in review area/year: **Pick List**

Describe flow regime: The District has characterized the flow in the stream as seasonal based on the average annual snowfall, indicators of an ordinary high water mark and scour in the channel, indicators of groundwater discharge into the channel, and an analysis of the drainage area using the District's seasonal stream evaluation protocol. Average annual snowfall at the site is 46.7 inches. In normal years the majority of this snow melts and is drained from the landscape through surface tributaries eventually finding its way to the Red River of the North. In normal years, the snowpack in combination with precipitation results in continuous flow from mid-to late March through June. The frequency and duration of flow in the unnamed tributary is sufficient to create an ordinary high water mark. District staff observed a clear natural line impressed on the bank, shelving, and sedi-

ment sorting in the channel. During a site investigation on December 1, 2011 no surface flow in the channel was observed but pools were observed sporadically throughout its length. These observations were made in the midst of a severe drought in this portion of Minnesota. No precipitation was recorded during the three days leading up to the site investigation and the only precipitation recorded in the 14 days preceding the investigation was 0.04 inches on November 27th. Persistent pools in the channel under these conditions are an indication of groundwater contributions to flow in the channel. To further evaluate flow in the tributary the District utilized its seasonal stream evaluation protocol. The protocol is based on the results of monitoring conducted on hundreds of first and second order channels throughout Minnesota and Wisconsin. In general, the St. Paul District's observations have identified that tributaries that have drainage areas in excess of one square mile typically meet the agency's definition of seasonal flow (continuous flow for at least three months). The drainage area for the unnamed tributary was determined to be 2.4 square miles or almost 2.5 times the threshold identified during the District's assessment of flow duration on first and second order tributaries. Given this information the District has charaterized the flow in the tributary as seasonal with continuous flow between ice out and mid-June. Stream flow may be present at other time and may also persist longer in years with normal precipitation if

groundwater discharge is supplying flow to the tributary.

Other information on duration and volume: The owner of the property where the tributary is located has provided conflicting information regarding the duration of flow in the tributary. In an oral statement to Corps staff on December 1, 2011 he indicated that flow is present in the channel from ice out until mid June. In a written statement to Mr. Brian Ross of Widseth Smith Nolting he states that there is only flow in the tributary for 2.5 weeks and after large rain events. In light of these discrepancies the Corps has chosen not to rely on these statements for this JD.

Surface flow is: **Discrete and confined.** Characteristics:

Subsurface flow: **Unknown.** Explain findings: Pools in channel in December more than 48 hours after a precipitation event during drought conditions indicate groundwater discharge into the tributary.

☐ Dye (or other) test performed:

Tributary has (check all that apply):

☒ Bed and banks

☒ OHWM[6] (check all indicators that apply)

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[6] A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by

- ☒ clear, natural line impressed on the bank
- ☐ the presence of litter and debris
- ☒ changes in the character of soil
- ☐ destruction of terrestrial vegetation
- ☒ shelving
- ☐ the presence of wrack line
- ☐ vegetation matted down, bent, or absent
- ☒ sediment sorting
- ☒ leaf litter disturbed or washed away
- ☐ scour
- ☐ sediment deposition
- ☐ multiple observed or predicted flow events
- ☐ water staining
- ☒ abrupt change in plant community
- ☐ other (list):

☐ Discontinuous OHWM.[7] Explain:

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development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.

[7] *Ibid.*

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):

- ☐ High Tide Line indicated by:
  - ☐ oil or scum line along shore objects
  - ☐ fine shell or debris deposits (foreshore)
  - ☐ physical markings/characteristics
  - ☐ tidal gauges
  - ☐ other (list):
- ☐ Mean High Water Mark indicated by:
  - ☐ survey to available datum;
  - ☐ physical markings;
  - ☐ vegetation lines/changes in vegetation types.

(iii) Chemical Characteristics:

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).

Explain: There is no quantitiatve water data for the tributary. Based on general watershed characteristics (predominantly comprised of open space with limited agricultural usage (row crops and hay) and residential dwellings) there should be no impairments in

the tributary. Further, the amount of impervious surface in the drainage area for the tributary is less than 10% which is under the recognized threshold above which adverse effects to water quality are seen as a result of urbanization.

Identify specific pollutants, if known: none known.

(iv) Biological Characteristics. Channel supports (check all that apply):

☒ Riparian corridor. Characteristics (type, average width): The tributary is buffered by a forested (deciduous) riparian corridor from its upstream origin downstream to the terminus at the Middle River. The riparian corridor increases in width moving from upstream to downstream along the tributary. The widths range from 5 feet (each side of the tributary) to approximately 300 feet (each side) near its confluence with the Middle River.

☐ Wetland fringe. Characteristics:

☐ Habitat for:

☐ Federally Listed species. Explain findings:

☐ Fish/spawn areas. Explain findings:

☐ Other environmentally-sensitive species. Explain findings:

☒ Aquatic/wildlife diversity. Explain findings: The tributary could serve as a movement corridor between the Middle River and the wetland and upland habitats adjacent to it. Amphibians, reptiles, and mammals all utilize stream channels as migration routes and various species of each are known to inhabit this portion of Minnesota.

2. Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW

(i) Physical Characteristics:

(a) General Wetland Characteristics:

Properties:

Wetland size: The wetlands in the review area total 145 acres

Wetland type. Explain: According to the National Wetland Inventory the wetlands in the review area consist of 133 acres of palustrine emergent/scrub shrub, broad-leaved deciduous, saturated, organic soil (PEM/SS1Bg) and 12 acres of Palustrine scrub shrub, broad- leaved deciduous, saturated, organic soil (PSS1B). The vegetative communities at the site were also mapped as part of the Minnesota Department of Natural Resources, Minnesota County Biological Survey (MCBS). The MCBS effort identified four wetland plant community types in the review area: rich fen, aspen forest, tamarack swamp, and willow swamp. In June 2011, Corps staff

completed a reconnaissance inspection of the wetlands in the review area to, among other things, conduct spot checks of the MCBS plant community type mapping. This investigation revealed that the rich fen is composed of the sedge subtype and the shrubby subtype, that the willow swamp was accurately mapped, and that the tamarack swamp mapped on the eastern portion of the site is really a hardwood swamp dominated by quaking aspen.

Wetland quality. Explain: The Mercil wetland complex (review area) is considered a Rich Fen (Minerotrophic) by the Minnesota Department of Natural Resources, with high vegetative biodiversity. During the June 2011 site inspection District staff noted observed that the wetlands within the review area had escaped significant alteration by activities such as grazing, cultivation and logging. As a result, the site appears to exist in a pre-European settlement condition and is correctly given an outstanding statewide biodiversity significance ranking by the MCBS. The exceptional quality of the wetlands in the review area is further enhanced by the high quality of the surrounding upland buffers and the unfragmented landscape of wetlands and uplands that represent one of the best examples of ridge and swale communities in Marshall County and northwestern Minnesota. A quantitative site-specific functional assessment has not been performed for the wetlands in the review area.

However, District staff who are familiar with application of the Minnesota Routine Assessment Methodology (MnRAM) for evaluating wetland functional assessment have qualitatively assessed the suite of functions addressed by MnRAM and concluded that given the reference standard quality of the site they would expect it to rate high or exceptional for the full suite of functions. These include: vegetative diversity/integrity, maintenance of characteristic hydrology, flood attenuation, downstream water quality, wetland water quality, characteristic wildlife habitat structure, and maintenance of characteristic amphibian habitat.

Project wetlands cross or serve as state boundaries. Explain:

(b) General Flow Relationship with Non-TNW:

Flow is: **Intermittent flow**. Explain: Surface flows from the wetlands in the review area move south from 120th Avenue into the MNDNR Wildlife Management area and then into the man made drainage feature that discharges into the unnamed tributary. Flow from the wetlands to the south underneath the road were observed during a site visit on June 1, 2011. Surface flows occur in response to snowmelt and precipitation with continuous discharges present between March and June and more intermittent discharges occurring after significant precipita-

tion events in other portions of the year. Peak discharges from the wetlands occur in the spring as a result of combined snowmelt and precipitation. This flow regime is best described as seasonal and intermittent.

Surface flow is: **Pick List**

Characteristics: At times during the year surface flow through the wetland can be described as overland sheet flow (March through June). Outside of this period, surface flows may be more confined to small channels that collect groundwater and precipitation and carry it south towards the unnamed tributary. The surface flow characteristics are best described as seasonal and intermittent.

Subsurface flow: **Unknown.** Explain findings: There has been no formal investigation of the subsurface flow from the wetlands. Evidence of groundwater discharge was observed in the tributary but the source of the groundwater or the contribution from the wetland has not been determined.

☐ Dye (or other) test performed:

(c) Wetland Adjacency Determination with Non-TNW:

☐ Directly abutting

☒ Not directly abutting

☒ Discrete wetland hydrologic connection. Explain: The review area creates an artificial boundary within a large continuous wetland that extends south towards the unnamed tributary and Middle River (see Figures 1 and 3). The wetland is also divided by 110th Ave NW but water flows freely between the road through 2-24 inch culverts (the culverts are located approximately 50 yards apart). Surface water was observed at similar elevations on both sides of the road during the June 2011 site visit. Along the southern edge of this wetland an east-west oriented drainage feature was excavated to intercept surface flows from the wetland and direct them to the east. This drainage feature was constructed in wetlands and is still considered to meet the wetland criteria in the Corps 87 manual and applicable regional supplement. This wetland drainage feature connects with a man-made drainage feature excavated through uplands that directs flows from the wetland to the southeast. This drainage feature did not have a continuous ordinary high water mark and, therefore, is not considered to be a tributary. The man-made drainage feature carries water approximately 512 feet to the southeast where it discharges into the unnamed tributary and ultimately the Middle and Red Rivers. Thus, the wetlands in the review area are part of a large wetland covering several hundred acres that is adjacent to the unnamed tributary via a discrete surface hydrologic connection.

☐ Ecological connection. Explain:

☐ Separated by berm/barrier. Explain:

(d) Proximity (Relationship) to TNW

Project wetlands are 30 (or more) river miles from TNW

Project waters are 30 (or more) aerial (straight) miles from TNW

Flow is from: **Wetland to navigable waters.**

Estimate approximate location of wetland as within the **Pick List** floodplain.

(ii) **Chemical Characteristics:**

Characterize wetland system (e.g., water color is clear, brown, oil film on surface; water quality; general watershed characteristics; etc.). Explain: The chemical characteristics of the wetlands in the review area was not directly assessed and visual inspections of the water in the wetland provided no obvious indications of water quality impairments (surface water in the wetland appeared clear). However the wetland is categorized as a rich fen which indicates that pH levels are near neutral but nutrient poor. As dis-

cussed in the tributary section of this JD, the surrounding landscape is primarily undisturbed open space which typically results in good water quality.

Identify specific pollutants, if known: None known.

(iii) **Biological Characteristics. Wetland supports (check all that apply):**

☐ Riparian buffer. Characteristics (type, average width):

☒ Vegetation type/percent cover. Explain: 90% rich fen consisting of a very diverse sedge dominated herbaceous litter and 10% aspen parkland consisting of quaking aspen, dogwood and a sedge dominated understory.

☐ Habitat for:

☐ Federally Listed species. Explain findings:

☐ Fish/spawn areas. Explain findings:

☐ Other environmentally-sensitive species. Explain findings:

☒ Aquatic/wildlife diversity. Explain findings: The wetlands in the review area are high quality and are used by amphibians, reptiles, mammals, and birds. The expansive size of the wet-

lands and its pre-European settlement condition make it a valuable resource in the agricultural dominated lanscape of western Minnesota.

3. **Characteristics of all wetlands adjacent to the tributary (if any)**

   All wetland(s) being considered in the cumulative analysis: **Pick List**

   Approximately (591) acres in total are being considered in the cumulative analysis.

   For each wetland, specify the following:

Directly abuts? (Y/N)	Size (in acres)	Directly abuts? (Y/N)	Size (in acres)

   see discussion below

   Summarize overall biological, chemical and physical functions being performed: The District has determined, based on the National Wetland Inventory, that there are 591 acres of wetlands adjacent to the relevant reach, including those within the review area (see Figure 3). While this approach likely underestimates the area of wetlands, a wetland delineation of the wetlands adjacent to the tributary and outside of the review area is not practical for this determination. The 591 acres are one continuous wetland that extends from the nor-

thern boundary of the drainage area of the relevant reach south towards the unnamed tributary (the wetland does not abut the unnamed tributary). Within this one wetland the NWI identifies six separate wetland types:

Palustrine emergent/scrub shrub, broad-leaved deciduous, saturated, organic soil 328.4 acres

Palustrine scrub shrub, broad-leaved deciduous/ emergent, saturated, organic soil 168.3 acres

Palustrine scrub shrub, broad-leaved deciduous/ forested needle-leaved deciduous, saturated, organic soil 51.8 acres

Palustrine scrub shrub, broad-leaved deciduous, saturated 3.5 acres

Palustrine scrub shrub, broad-leaved deciduous, saturated, organic soil 38.7 acres

Palustrine unconsolidated bottom, intermittently exposed, excavated 0.4 acre

As discussed in the preceding section of the JD (addressing wetlands in the review area), the entire drainage area and the wetlands within it that are adjacent to the unnamed tributary exist in a mostly undisturbed pre-European settlement condition. In light of this, District staff has qualitatively assessed the functions these wetlands provide and concluded that the wetlands outside of the review area would also

score exceptional or high for the suite of functions previously identified.

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional

Guidebook. Factors to consider include, for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:

1. **Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus be-

low, based on the tributary itself, then go to Section III.D:

2. **Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: See attached document titled "Section III.C. Significant Nexus Determination"

3. **Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D:

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/ WETLANDS ARE (CHECK ALL THAT APPLY):

1. **TNWs and Adjacent Wetlands.** Check all that apply and provide size estimates in review area:

   ☐ TNWs: linear feet width (ft), Or, acres.

   ☐ Wetlands adjacent to TNWs: acres.

2. **RPWs that flow directly or indirectly into TNWs.**

   ☐ Tributaries of TNWs where tributaries typically flow year-round are jurisdictional. Provide data and rationale indicating that tributary is perennial:

   ☐ Tributaries of TNW where tributaries have continuous flow "seasonally" (e.g., typically three months each year) are jurisdictional. Data supporting this conclusion is provided at Section III.B. Provide rationale indicating that tributary flows seasonally:

   Provide estimates for jurisdictional waters in the review area (check all that apply):

   ☐ Tributary waters: linear feet width (ft).

   ☐ Other non-wetland waters: acres. Identify type(s) of waters:

3. **Non-RPWs[8] that flow directly or indirectly into TNWs.**

   ☐ Waterbody that is not a TNW or an RPW, but flows directly or indirectly into a TNW, and it has a significant nexus

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[8] See Footnote # 3.

with a TNW is jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional waters within the review area (check all that apply):

☐ Tributary waters: linear feet width (ft).

☐ Other non-wetland waters: acres.

Identify type(s) of waters:

4. **Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.**

☐ Wetlands directly abut RPW and thus are jurisdictional as adjacent wetlands.

☐ Wetlands directly abutting an RPW where tributaries typically flow year-round. Provide data and rationale indicating that tributary is perennial in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW:

☐ Wetlands directly abutting an RPW where tributaries typically flow "seasonally." Provide data indicating that tributary is seasonal in Section III.B and rationale in Section III.D.2, above. Provide rationale

indicating that wetland is directly abutting an RPW:

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

5. **Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs.**

☐ Wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisidictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional wetlands in the review area: 250 acres.

6. **Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.**

☒ Wetlands adjacent to such waters, and have when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional wetlands in the review area: 155 acres.

7. **Impoundments of jurisdictional waters.**[9]

As a general rule, the impoundment of a jurisdictional tributary remains jurisdictional.

☐ Demonstrate that impoundment was created from "waters of the U.S.," or

☐ Demonstrate that water meets the criteria for one of the categories presented above (1-6), or

☐ Demonstrate that water is isolated with a nexus to commerce (see E below).

E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):[10]

☐ which are or could be used by interstate or foreign travelers for recreational or other purposes.

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[9] To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.

[10] **Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA *Memorandum Regarding CWA Act Jurisdiction Following Rapanos.***

☐ from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.

☐ which are or could be used for industrial purposes by industries in interstate commerce.

☐ Interstate isolated waters. Explain:

☐ Other factors. Explain:

Identify water body and summarize rationale supporting determination:

Provide estimates for jurisdictional waters in the review area (check all that apply):

☐ Tributary waters: linear feet width (ft).

☐ Other non-wetland waters: acres.

Identify type(s) of waters:

☐ Wetlands: acres.

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):

☐ If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.

☐ Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.

☐ Prior to the Jan. 2001 Supreme Court decision in "*SWANCC*," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).

☐ Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain:

☐ Other: (explain, if not covered above):

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):

☐ Non-wetland waters (i.e., rivers, streams): linear feet width (ft).

☐ Lakes/ponds: acres.

☐ Other non-wetland waters: acres. List type of aquatic resource:

☐ Wetlands: acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):

☐ Non-wetland waters (i.e., rivers, streams): linear feet width (ft).

☐ Lakes/ponds: acres.

☐ Other non-wetland waters: acres. List type of aquatic resource:

☐ Wetlands: acres.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (check all that apply--checked items shall be included in case file and, where checked and requested, appropriately reference sources below):

☒ Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant:

☐ Data sheets prepared/submitted by or on behalf of the applicant/consultant.

☐ Office concurs with data sheets/ delineation report.

☐ Office does not concur with data sheets/ delineation report.

☐ Data sheets prepared by the Corps:

☐ Corps navigable waters' study:

☒ U.S. Geological Survey Hydrologic Atlas:

☒ USGS NHD data.

☒ USGS 8 and 12 digit HUC maps.

☒ U.S. Geological Survey map(s). Cite scale & quad name: 1:24,000, Newfolden, Minnesota.

☒ USDA Natural Resources Conservation Service Soil Survey. Citation: Marshall County, Minnesota.

☒ National wetlands inventory map(s). Cite name: Newfolden, Minnesota.

☐ State/Local wetland inventory map(s):

☐ FEMA/FIRM maps:

☐ 100-year Floodplain Elevation is: (National Geodectic Vertical Datum of 1929)

☒ Photographs: ☒ Aerial (Name & Date): Lidar, 2011, FSA 2010.

or ☐ Other (Name & Date):

☐ Previous determination(s). File no. and date of response letter:

☐ Applicable/supporting case law:

☒ Applicable/supporting scientific literature: Mitch, W.J., Gosselink, J.G. (2000). Wetlands (Third ed.) New York: John Wilry & Sons Inc.

☒ Other information (please specify): Maps, JD determination, property owner statement and on-site photos submitted on behalf of the

applicant on December 19, 2011, by Widseth, Smith and Nolting.

B. ADDITIONAL COMMENTS TO SUPPORT JD: Conclusions regarding Section III B.2 were reached with field review on June 1 and December 1, of 2011. These conclusions are therefore based on those site visits, knowledge of local stream morphology, geologic characteristics, and GIS review. Land use surrounding the relevant reach is predominantly agricultural, peat mining, with a smaller amount of residential. The functions of the wetlands adjacent to the relevant reach combined with the functions provided by the tributary results in a significant nexus to the Red River, a TNW After reviewing and considering the data submitted by the applicant, the Corps rejects the applicant's position that the wetland review area is isolated. The Corps determination is that there is a significant nexus between the wetland review area and the Red River (TNW).

Section III.C. Significant Nexus Determination

Wetlands and streams are recognized as providing a number of important functions to downstream waters, both individually and cumulatively. These include maintenance of water quality, mitigation of storm and flood flows, maintenance of base flows, energy and nutrient export, pollutant and nutrient transformation and retention, and maintenance of wildlife habitat. The functions provided by the relevant reach and the

nexus to the Red River are discussed in the following paragraphs.

Summary of Functions Provided by Wetlands in the Relevant Reach

The wetlands adjacent to the relevant reach of the tributary total approximately 590 acres. The wetlands are comprised of rich fen, aspen forest, willow swamp, and hardwood swamp vegetative communities. From a hydrogeomorphic classification perspective the wetlands are classified primarily as organic flats which are characterized as having a water regime dominated by precipitation while water loss is typically by overland flow and seepage to groundwater. Organic flats are also distinctive in that their elevation and topography are controlled by the vertical accretion of organic matter. Within the review area, Corps staff has confirmed that surface water flows from/through the wetland are generally to the south towards the Middle River. The surface elevations in the wetlands vary between 1,141 ft in the north to 1,134 ft in the south. The outlet of the wetlands is a man made surface ditch that carries flows to an unnamed tributary of the Middle River. The wetlands in the relevant reach have been assessed to function at a high level for all the functions considered[1], however, a few are called out

[1] Based on the high quality plant communities present and the undisturbed condition of the wetlands and adjacent uplands.

for the significance of their relationship to the Red River.

Flood and Stormwater Storage/Attenuation. The wetlands adjacent to the relevant reach of the tributary provide an important flood storage function. During a site investigation in June, 2011 Corps staff noted between 6 and 20 inches of standing water at various locations within and outside of the wetlands in the review area. This surface water was being slowly released south into the unnamed tributary to the Middle River. The amount of surface water in the wetland decreased throughout the growing season, an indication that the wetland stores water early in the spring and summer. The timing of the storage function provided by the wetlands parallels the stream flow of the unnamed tributary such that the storage of melting snow and precipitation is attenuated in the wetlands and then released through the unnamed tributary from mid-march through june in normal years. To estimate the potential surface water storage capacity of the wetlands in the relevant reach, the Corps utilized surface elevation data to conduct a coarse scale GIS based analysis. The analysis estimated that the wetland is able to provide over 200 acre-feet of storage.[2] This estimate does not consider the effects of vegetation, evapotranspiration, or the storage capacity of soils at the site. This potential

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[2] A more detailed description of the methods for determining wetland storage is available in the administrative record.

storage is particularly important following spring runoff and following storm events when wetlands help to elongate the period during which water is released downstream thereby reducing the peak of the hydrograph in the Red River. This has an overall effect of reducing downstream flooding by holding water in these upper portions of the watershed.

Biogeochemcial Processes The wetlands in the relevant reach transform and store pollutants and nutrients, which is important for downstream water quality. The wetlands at the site are receiving chemical inputs from adjacent uplands, precipitation, and atmospheric deposition. The transformation of these inputs is the primary source of nutrients and organic carbon into the riverine system. The nitrogen, phosphorus, and carbon cycling that occur in these wetlands, coupled with the surface flows and groundwater discharge to the tributary system is important to the productivity and health of the downstream receiving waters. These benefits are not limited to the intermediate waters between the relevant reach and the TNW but also to the Red River itself. As described in the chapter on Northern Peatlands in Mitsch and Gosselink's *Wetlands*, peatlands with surface outflows export nutrients, organic carbon, and energy. These wetlands also serve as considerable sinks of nutrients and in situations where the peat is eroded from the source have the potential to release much more significant quantities of nitrogen, phosphorus, and mercury. Since the vast majority of stream miles and wetlands

in the watershed are located in and along headwater streams, the biogeochemical processing functions they provide are essential to maintaining water quality and aquatic habitat and, if present, eliminating identified impairments. For the relevant reach, the functions performed by these wetlands is more important given that there are over five hundred acres of wetlands present performing these functions.

Summary of Functions Provided by the Tributary in the Relevant Reach

The relevant reach of the tributary is an unnamed first order stream that flows to the Middle River. The flow regime of the tributary is intermittent[3] The tributary originates approximately 1,800 feet southeast of the review area. It flows approximately 1,500 feet southeast before merging with another first order stream and entering the Middle River. The drainage area is approximately 2.4 square-miles. The drainage area is relatively unaltered and consists predominantly of open space with smaller areas of agriculture, residential dwellings, and roads.

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[3] The Corps has not quantitatively assessed the flow regime of the tributary but, based on the size of the drainage area, observed flow through the wetlands in June, and direct observations of groundwater supported pools in the stream channel, has made a determination that the stream has an intermittent flow regime and would also be considered a seasonal stream per agency guidance.

The physical and hydrologic functions of headwater streams are associated with the transfer of mass, momentum, energy, and organisms. The streams essentially function as conduits with the rate of transfer influenced by the flow characteristics of the stream including magnitude (discharge), frequency, duration, timing (seasonality of different flow regimes), and the rate of change (transition time between flows of given magnitudes). The District has characterized the flow in the tributary as intermittent with continuous flow occurring from mid-March through June in normal years. Based on the approximate channel dimensions recorded during the December 2011 site investigations and a maximum water depth in the channel of two feet, the unnamed tributary has an estimated channel cross sectional area of 5.5 square feet. Assuming an a range of average velocities between 0.1 and 1.5 feet/second for flows in the channel between March and June during the spring, the discharge to the Middle River would range from 0.55–8.25 cubic feet/second. Outside of the continuous flows in the spring, additional flow events occur in response to precipitation events and in the fall when precipitation exceeds evapotranspiration prior to winter freeze and snowfall. In northern Minnesota, discharge and velocity for this type of channel would typically be highest in the spring (March and April) in response to snowmelt and precipitation. Stream flow steadily declines through late April and May and may dissipate completely by

sometime in June or July when evapotranspiration rates are highest.

In addition to the water in the channel, the tributary also transports energy, materials, and nutrients downstream. Indicators of this transport function were observed by the Corps during the December 2011 site inspection when leaves and woody debris were observed along the length of the stream. These materials are either broken down in the stream by decomposers in the channel to provide energy and nutrients for other biota or are carried further downstream where they are either broken down or provide structure that increases channel roughness and improves habitat. The transport of sediment, a pollutant of concern in the Middle and Snake Rivers, was not quantified for this determination. It was obvious that some material is being transported downstream from the observations of natural bank erosion in the tributary and the sorting of sediments in the channel. District staff did not observe any areas along the tributary during the 12/1/2011 field visit where the stream bank appears to be failing or eroding in excess of what normally would be observed on a stable first order stream. These contributions are viewed as components of a natural process and are not considered excessive or problematic in terms of a contribution to a documented turbidity impairment in the Red River. In contrast, by not contributing more than an expected amount of sediment, the tributary is performing a valuable function by maintain a stable condition and pre-

venting additional loading downstream. Therefore, the relevant reach is not expected to be a significant source of sediment to downstream receiving waters, a characteristic which is a benefit to the Middle, Snake, and Red Rivers.

There is no water quality data for the unnamed tributary. However, general inferences about potential pollutants can be made by evaluating the general characteristics within the drainage area of the relevant reach. The contributing area to the tributary is predominantly comprised of open space with limited agricultural usage (row crops and hay) and residential dwellings. In general, areas with limited impervious surfaces and agricultural use have better water quality and are less likely to have water quality impairments. As a result, the discharges from the relevant reach would be viewed as having a beneficial effect on the downstream TNW.

Headwater streams play an important role in nutrient transformations. Although the majority of these studies have focused on perennial headwater streams, the tributary in the relevant reach would be expected to provide these functions to some degree when downstream discharges are occurring. Headwater streams constitute up to 85% of total stream length within a drainage network, directly connect the upland and riparian landscape to the rest of the stream's ecosystem, and collect most of the water and dissolved nutrients from adjacent terrestrial ecosystems. Due to

their large surface-to-volume ratios, small streams play an important role in regulating water chemistry. Despite their relatively small dimensions, they play a disproportionately large role in the uptake and transformation of inorganic nitrogen (Peterson et al. 2001). Headwater streams are also home to organisms that break down organic matter and release inorganic carbon and other nutrients that are utilized to support food webs further downstream. Decreased levels of inorganic carbon and other nutrients, limit plant growth further downstream, which in turn directly impact food availability for primary herbivores and those organisms that feed upon them. Indicators of this function being performed by the stream were observed during investigations on 12/1/2011. District staff observed woody debris in various forms of decomposition and also noted the presence of leaf litter and other organic material in the channel bottom. The presence of these materials confirms that the tributary is serving a transport function for organic matter to downstream waters.

Institutional Recognition of the Functions Provided by the Tributary and its Adjacent Wetlands

The functions provided by the wetlands at the site must also be considered in a broader regional (Red River Valley) and watershed (Red River Basin) context. The Red River of the North is unique, as Thomas Waters describes in his book "*The Streams and Rivers of Minnesota*", the valley associated with

the Red River of the North is not formed by the river as valleys are typically formed, but in this case, the valley is actually a glacial lake basin. The Red River "merely collects the drainage of an extinct lake bed and remains a meandering stream that is small relative to its vast watershed" (Waters 1977).

Lake Agassiz, the shallow glacial lake that covered much of northwestern Minnesota, northeastern North Dakota, and southern Manitoba left a unique geologic setting within the Upper Great Plains that still strongly influences hydrology, stream geomorphology, and aquatic biota today (Emmons and Oliver 2009). The Valley has three distinct regions: the lakeplain, the Agassiz beach ridges and interbeach area, and the glacial moraine (RRBFDRWG 2001). Prior to settlement, the area was a vast complex of tall grass prairie, interspersed with wet meadows, marshes, fens and peatlands; and edged by oak and aspen woods. Headwater streams rose in the moraines, cut through the beach ridges and flowed to the Red River.

Because the Basin's lakeplain is one of the largest level tracts of land in the world, with excellent soils and mild summers, early settlers recognized its tremendous agricultural potential. Today, the lakeplain is almost entirely converted to farmland. As in many other agricultural areas, the primary natural resource concerns in the Valley are soil erosion, increased runoff and sedimentation, poor water quality, degradation of aquatic habitat and the loss of wildlife habitat and

biological diversity. The primary economic concerns include frequent flooding that results in flood damages to agricultural crops, infrastructure and communities.

In Marshall County, less than 20% of pre-settlement wetlands remain, a fact recognized by State and Federal regulatory agencies that regulate impacts to the remaining wetlands (Anderson and Craig 1984). Impacts of flooding within the basin and the loss of habitat and biodiversity have been discussed for decades. Vast amounts of studies, monitoring data, and models have been collected and developed for the Red River Valley. The agencies have recognized that the cumulative loss of wetlands has had a detrimental effect on the integrity of the aquatic systems in the watershed and that the functions provided by those that remain are important to the downstream receiving waters including the Red River. Efforts in the past decade have focused on addressing the problems from a watershed perspective and recognizing that integrating flood damage reduction and natural resource protection and restoration efforts should occur at the basin level.

Characteristics of the Red River of the North and Linkages to Functions Performed in the Relevant Reach

The Red River is subject to frequent flood events. During the 10-year period between 2001 and 2010, the yearly peak streamflow at the USGS gage maintained in Drayton, North Dakota (located approximately 24

river miles downstream where the Snake River flows into the Red River) reached minor flood stage in 3 years, moderate flood stage in 2 years, and major flood stage in 3 years. Because the Red River valley is relatively flat, flood events often cover large areas of land. Flood damage reduction (FDR) projects have been undertaken or are planned by local, state, and federal agencies in numerous communities affected by Red River flooding.

In 1998, the Red River Water Management Board (RRWMB), the Red River Basin Flood Damage Working Group, and others forged an agreement to establish a collaborative approach to solving issues in the basin (RRBFDRWG 1998). An initial flood damage reduction framework was developed that began to model and identify the contribution of each watershed in the basin to flooding on the mainstem Red River. One of the primary strategies developed was and continues to be storing water in the upstream areas of a watershed through both natural and constructed wetlands. The fundamental premise is that flood damage reduction along the main stem of the Red River and the lower reaches of its major tributaries is substantially dependent on the types and locations of FDR and related measures implemented upstream, fundamentally mimicking the pre-settlement ecosystem that existed in the valley.

Recently, the framework was reaffirmed after the completion of additional modeling and further allocat-

ed reduction goals to each watershed based on their contributions to the peak flows on the Red River (RRBC 2011). The Middle-Snake-Tamarac Rivers Watershed District (Watershed District) identifies a goal of a 20% reduction in peak flow from the Middle River watershed in its Final Ten Year Watershed Management Plan (MSTRWD 2011). This plan includes creating and restoring approximately 380 acres of wetlands in the Middle River watershed to achieve the 20% reduction goal.

The Red River is listed as impaired for aquatic life and aquatic consumption (MPCA, 2010). The pollutants/stressors for these impairments are mercury and PCB in fish tissue and turbidity. The Middle River is listed as impaired for dissolved oxygen and turbidity. The relevant reach of the tributary and its adjacent wetlands are likely not a contributing source of the listed impairments for the Red River or Middle River because they are currently in a primarily undisturbed condition and the functions they are performing are preventing rather than contributing to water quality impairments.

The Red River is recognized as an important fishery. Common game fish species in the river include channel catfish, northern pike, smallmouth bass, sauger, and walleyes. The network of streams in the Red River watershed are critical to different phases of a fish's life cycle, with the tributaries used for spawning and rearing young and on the main stem for refuges during

harsh weather. The Red River is also the historical habitat of the lake sturgeon (*Acipenser fulvescens*), a species of special concern in Minnesota. As a result of over exploitation, construction of dams, and declines in water quality by the mid-1900s, the species had largely been extirpated in the Red River. The Minnesota Department of Natural Resources (MNDNR) is working with several Federal and state agencies, as well as the Canadian Government, to return a viable population of lake sturgeon to the Red River. Improving water quality and restoring and or maintaining spawning habitat in the tributaries to the Red River, including the Middle River, are noted as important components of the MNDNR's long range plan.

For terrestrial wildlife species, the important habitat areas remaining in the basin are floodplain forests and all areas of native vegetation, particularly those containing high quality complexes or clusters of different plant communities. The wetlands adjacent to the relevant reach of the tributary are located in the Agassiz Beach Ridge and interbeach area. The beach ridges provide important staging areas for migrating sandhill cranes, waterfowl, and shorebirds. This area contains clusters of biologically rich areas, containing many of Minnesota's rare species (RRBFDRWG 2001). The wetlands adjacent to the relevant reach of the tributary are identified as a high quality wetland community in the county biological survey (MCBS) completed by the state and identified in the Minnesota Biological Survey (MBS) as sites of high and outstanding biolog-

ical significance. The Middle-Snake-Tamarac River Watershed District identifies these wetlands as important resources that should be protected and conserved. (MSTRWD 2011).

Significant Nexus Determination

The combined functions of the tributary and its adjacent wetlands have a significant nexus on the Red River of the North based on the following:

- The wetlands adjacent to the tributary provide an important water storage function. The wetlands are located in the upper portion of the watershed and within the areas identified as being important for storing water to reduce peak flows on the Red River. Modeling has shown that relationships between tributaries and the main Red River in this part of the basin are easiest to understand and activities that decrease the peak flow from these areas will decrease peak flows on the main Red River (Anderson and Kean 2004). The District calculated a storage potential of 200-acre feet for the wetlands in the review area. The maximum storage of the wetlands is realized primarily between March and June each year when the risk of flooding on the Red River of the North is greatest. This is also the time of year that the tributary has continuous flow thus linking the functions of the wetlands and the tributary to the Red River of the North during a critical time of the year. The importance of this

storage function is recognized by the Middle-Snake-Tamarac Rivers Watershed District (Watershed District) who is responsible for protecting and maintaining the health of these watersheds including the reduction and/or prevention of flooding. One of the components of the Watershed District's management plan is to create and restore approximately 380 acres of wetlands in the Middle River watershed to assist in meeting their goal of a 20% reduction in peak flow from the watershed.

- The tributary provides a source of nutrients and energy (organic carbon) to the Red River of the North. The importance of the contributions of headwater streams and their adjacent wetlands is well documented in the scientific literature. The District analysis has demonstrated that the wetlands and the tributary are performing the functions that provide these essential inputs. The tributary also provides nutrient transformation functions by breaking down and transporting organic matter (leaf litter and woody debris) into forms more readily available to biota in downstream receiving waters. Further, the tributary serves as a conduit for the export of these materials from the relevant reach. The flow regime of the channel provides these materials during the period of peak discharge between March and June each year and in response to more significant precipitation events outside

of this time period. These contributions from the relevant reach to the Middle River and eventually the Red River are important for maintaining and improving habitat for the fisheries in the Red River of the North including the lake sturgeon. Improving the quality of the habitat in the Middle River and the Red River of the North is heavily reliant on the quality of the inputs into these rivers. The District's assessment of the relevant reach is that it is having a beneficial effect on the downstream receiving waters.

- The high quality condition of the relevant reach is preventing excess loading of sediment to the Middle River and the Red River of the North. Both of these rivers are listed as impaired for turbidity by the MPCA. The wetlands in the relevant reach are trapping and holding sediment and preventing further transport downstream. Further, District staff inspected the tributary channel and did not observe any significant erosion or bank failures. The flood storage provided by the wetlands helps to moderate discharge in the tributary which prevents erosion. Thus, the condition of the relevant reach is protecting downstream water quality by preventing stream bank failures, excessive erosion, and transport of these materials downstream.

- The organic flat wetlands in the relevant reach are a potential source of mercury and nutrient loading to the Red River of the North. In their current condition, the wetlands in the relevant reach are a sink for nutrients and mercury because the accumulating organic material acts as a nutrient sink. Studies have shown that when the organic material (peat) is eroded, disturbed, or otherwise transported downstream there is a high potential to release nutrients and mercury into discharge waters and degrade downstream water quality. During the periods of high surface flow in the spring, the discharges from the wetlands would carry nutrients and mercury through the unnamed tributary to the Middle River and eventually into the Red River of the North. The potential for the release of mercury from organic flat wetlands is recognized by the State of Minnesota and discharges from commercial peat mining operations are often monitored for mercury and sometimes must be treated before leaving a site. The retention function provided by the wetlands is thus preventing the release of mercury from the organic material and preventing additional mercury loading to the Red River of the North.

Based on these considerations, a significant nexus exists between relevant reach (comprised of the tributary and its adjacent wetlands) and the Red River of the North, a traditionally navigable water.

References:

Anderson, C. and A. Kean. 2004. Red River Basin Flood Damage Reduction Framework. Red River Basin Flood Damage Reduction Work Group. Technical and Scientific Advisory Committee. Technical Paper No. 11.

Anderson, J.P and W.J. Craig. 1984. Growing energy crops on Minnesota's wetlands: the land use perspective.

Emmons and Oliver. 2009. Red River Biotic Impairment Assessment prepared for the MnPCA.

MBS. Minnesota Biological Survey. 1987-2012. Minnesota Department of Natural Resources.

MCBS. Minnesota County Biological Survey. Native Plant Communities and Rare Species of Marshall County, MN. Minnesota Natural Heritage Information System. Minnesota Department of Natural Resources.

Mitsch, W.J. and J.G. Gosselink. Wetlands. 1986. (4th edition 2007). Wiley.

MPCA. 2010. Minnesota Pollution Control Agency. 2010 Approved 303 d Impaired Waters List.

MSTRWD. 2011. Final Ten Year Watershed Management Plan—Middle-Snake-Tamarac Rivers Watershed District.

Peterson BJ, Wolheim WM, Mulholland PJ, Webster JR, Meyer JL, Tank JL, Marti E, Bowden WB, Valett HM, Hershey AE, McDowell WH, Dodds WK, Hamilton SK, Gregory S, Morrall DD. 2001. Control of Nitrogen Export from Watersheds by Headwater Streams. Science 292:86-90.

RRBC. 2011. Red River Basin Commissions' Long Term Flood Solutions (LTFS) For the Red River Basin.

RRBFDRWG. 1998. Red River Basin Flood Damage Reduction Work Group (RRBFDRWG). Mediation Agreement.

RRBFDRWG. 2001. Red River Basin Flood Damage Reduction Work Group. Natural Resource Efforts in the Red River Basin.

Waters, T. F 1977. *The Streams and Rivers of Minnesota.* Minneapolis, Minnesota; University of Minnesota Press.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No.: 13-3067

HAWKES CO., INC., ET AL.

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
APPELLEE

AMERICAN FARM BUREAU FEDERATION, ET AL.,
AMICI ON BEHALF OF APPELLANT(S)

July 7, 2015

ORDER

Appeal from U.S. District Court for the
District of Minnesota – Minneapolis
(0:13-cv-00107-ADM)

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 07, 2015

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ MICHAEL E. GANS
MICHAEL E. GANS

APPENDIX E

1. 5 U.S.C. 704 provides:

Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

2. 33 U.S.C. 1311(a) provides:

Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

3. 33 U.S.C. 1319 provides in pertinent part:

Enforcement

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public

notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph

(1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint

source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsec-

tion may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

* * * * *

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State,,[1] or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to

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[1] So in original.

comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

* * * * *

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available—

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary,

the Administrator or Secretary, as the case may be, may, after consultation with the State in which the

violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

(2) Classes of penalties

(A) Class I

The amount of a class I civil penalty under paragraph (1) may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000. Before issuing an order assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section 554 or 556 of title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) Class II

The amount of a class II civil penalty under paragraph (1) may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000. Except as otherwise provided in this subsection, a class II civil pen-

alty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of title 5. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph.

(3) Determining amount

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(4) Rights of interested persons

(A) Public notice

Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public

notice of and reasonable opportunity to comment on the proposed issuance of such order.

(B) Presentation of evidence

Any person who comments on a proposed assessment of a penalty under this subsection shall be given notice of any hearing held under this subsection and of the order assessing such penalty. In any hearing held under this subsection, such person shall have a reasonable opportunity to be heard and to present evidence.

(C) Rights of interested persons to a hearing

If no hearing is held under paragraph (2) before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with paragraph (2)(A) in the case of a class I civil penalty and paragraph (2)(B) in the case of a class II civil penalty. If the Administrator or Secretary denies a hearing under this subparagraph, the Administrator or

Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

(5) Finality of order

An order issued under this subsection shall become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(C). If such a hearing is denied, such order shall become final 30 days after such denial.

(6) Effect of order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation—

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order

not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

(B) Applicability of limitation with respect to citizen suits

The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title shall not apply with respect to any violation for which—

(i) a civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or

(ii) notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under section 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

(7) Effect of action on compliance

No action by the Administrator or the Secretary under this subsection shall affect any person's obligation to comply with any section of this chapter or with the terms and conditions of any permit issued pursuant to section 1342 or 1344 of this title.

(8) Judicial review

Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment—

(A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(B) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified

copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

* * * * *

4. 33 U.S.C. 1344(a) provides:

Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

5. 33 C.F.R. 320.1(a) provides in pertinent part:

Purpose and scope.

(a) *Regulatory approach of the Corps of Engineers.*

* * * * *

(6) The Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act or the Rivers and Harbors Act of 1899 to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities. A determination pursuant to this authorization shall constitute a Corps final agency action. Nothing contained in this section is intended to affect any authority EPA has under the Clean Water Act.

* * * * *

6. 33 C.F.R. 331.2 provides in pertinent part:

Definitions.

The terms and definitions contained in 33 CFR parts 320 through 330 are applicable to this part. In addition, the following terms are defined for the purposes of this part:

* * * * *

Approved jurisdictional determination means a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. Approved JDs are clearly designated appealable actions and will include a basis of JD with the document.

* * * * *

Jurisdictional determination (JD) means a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) or a written determination that a waterbody is subject to regulatory jurisdiction under Section 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*). Additionally, the term includes a written reverification of expired JDs and a written reverification of JDs where new information has become available that may affect the previously written determination. For example, such geographic JDs may include, but are not limited to, one or more of the following determinations: the presence or absence of wetlands; the location(s) of the wetland boundary, ordinary high water mark, mean high water mark, and/or high tide line; interstate commerce nexus for isolated waters; and adjacency of wetlands to other waters of the United States. All JDs will be in writing and will be identified as either preliminary or approved. JDs do not include deter-

minations that a particular activity requires a DA permit.

* * * * *

Preliminary JDs are written indications that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel. Preliminary JDs are advisory in nature and may not be appealed. Preliminary JDs include compliance orders that have an implicit JD, but no approved JD.

* * * * *